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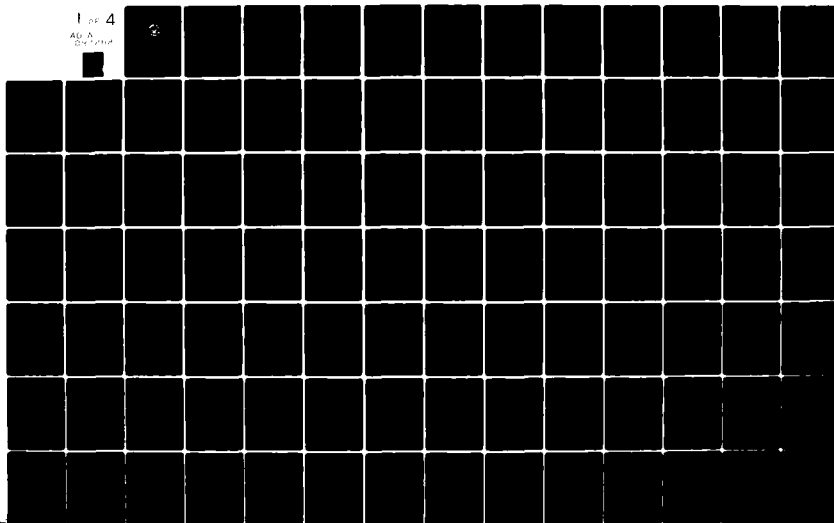
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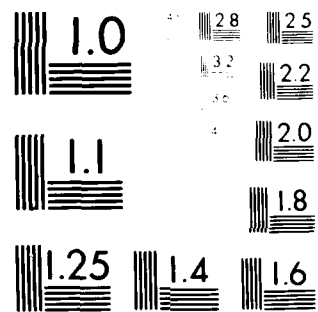
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THESIS

IMPLEMENTATION OF THE SERVICE CONTRACT
ACT OF 1965

by

Rodney Fujio Matsushima

December 1980

Thesis Advisor:

M. L. Sneiderman

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Implementation of the Service Contract Act of 1965

by

Rodney Fujio Matsushima
Lieutenant Commander, United States Navy
B.S., Purdue University, 1971

Submitted in partial fulfillment of the
requirements for the degree of

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ABSTRACT

The major issues concerning the implementation of the Service Contract Act of 1965 are addressed. Current implementation problems experienced by procurement agencies are identified. The intent of the law, the Department of Labor's administration of the law, and procuring agencies' actual implementations are coupled with DOD DAC 76-20 on coverage and implementation of the Service Contract Act to develop a service contract procedure manual. This manual might also be used as a training guide.

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I. INTRODUCTION

A. GENERAL

In October 1965, President Johnson signed Public Law 89-286 (Service Contract Act of 1965), bringing to a conclusion a history of legislative effort ranging back to the 87th Congress. One of the sponsors of the law indicated that service and maintenance contracts were the only major category of Federal work where labor standards were not generally applicable and that action was overdue in closing this serious gap in our labor standard laws. [14:353]

When the Service Contract Act (SCA) was written in 1965, it was a page-and-a-half long. After three sets of amendments (in 1968, 1972, and 1976) gradually increased coverage beyond the minimum-wage blue collar level, industries all across the land now call the SCA a prime example of Government going crazy.

The SCA empowers the Secretary of Labor to enforce the Act, make rules, regulations, issue orders, hold hearings, make decisions upon findings of fact, and take other actions. Private industry is required to provide services within the provisions of the SCA and finally, the Field Purchasing Activity is saddled with the problem of implementing the SCA.

It is the objective of this thesis to assist the contracting officer and contracting personnel to understand the problems of implementation inherent within the SCA. Differing views from contracting officers, line and staff managers, lawyers, and policy makers were examined, consolidated, analyzed, and presented. Through this process, an attempt will be made

to satisfactorily answer the central research question: "What have been the major issues concerning the implementation of the Service Contract Act and how might these issues be resolved?".

B. SCOPE AND ASSUMPTIONS

The scope of this effort is limited to discussions on the central issues and problems inherent in the SCA. The original intent and subsequent evolution through major Comptroller General Decisions, ASBCA decisions and Congressional Amendments will be discussed and analyzed with respect to its impact on the implementing agencies. The issues will deal with service contracting in general and not go into the specifics of any class of service contracts.

It is assumed that the reader has a more than casual understanding of Department of Defense contracting.

C. METHODOLOGY

Primary research material was collected from discussions with personnel intimately involved in the service contracting arena. Telephone interviews were made with contracting personnel at the Navy Regional Contracting Office (NRCO), Washington, D.C.; NRCO, Long Beach; NRCO, Charleston; NSC, Norfolk; NSC, Pearl Harbor; and NSC, San Diego.

Telephone interviews with the Navy Labor Relations Personnel provided invaluable insight into the problem areas. These interviews were conducted with Mr. Richard Hedges, Headquarters, Naval Material Command; and Mr. Tom Faltinow, Western Division, Naval Facilities Engineering Command.

Interviews with policy makers were held with the Naval Supply Systems Command and DAR Counsel.

Finally interviews were held with Navy members of counsel at NSC Oakland, NSC Pearl Harbor, and NRCO Philadelphia.

Secondary research material included a comprehensive search of the literature base for applicable studies and articles. Information was obtained from the library of the Naval Postgraduate School, the Defense Logistics Information Center, Fort Lee, Virginia, the Federal Legal Information Through Electronics (FLITE), Denver, Colorado, and the legal library at NSC, Oakland, California.

The primary by-product will be a model or guide that can be utilized by contracting personnel as a training aid or procedures manual on the implementation of the SCA. This guide was developed and sent to numerous field activities and knowledgeable persons for comments.

D. DEFINITIONS

1. Service Contract

A service contract is defined by the Defense Acquisition Regulation (DAR) 22-101 as a contract which calls directly for a contractor's time and effort rather than for a concrete end item. Service contracts are generally found in areas involving the following categories:

[15]

a. Maintenance, overhaul, repair, servicing, rehabilitation, salvage, and modernization or modification of supplies, systems, and equipment.

b. Maintenance, repair, rehabilitation, and modification of real property.

- c. Architect-engineering.
- d. Expert and consultant services.
- e. The services of DOD-sponsored organizations.
- f. Installation of equipment obtained under separate contract.
- g. Operation of Government-owned equipment, facilities,
and systems.

- h. Engineering and technical.
- i. Housekeeping and base services.
- j. Transportation and related services.
- k. Training and education.
- l. Medical services.
- m. Photographic, printing, and publication services.
- n. Mortuary services.
- o. Communications services.
- p. Test services.
- q. Data processing.
- r. Warehousing.
- s. Auctioneering.
- t. Arbitration.
- u. Stevedoring.
- v. Research and development.

2. Categories of Service Contracts

The armed forces generally categorize service contracts as follows:

a. **Expert and Consultant Services**

These support services are performed by personnel who are exceptionally qualified, by education or experience, in a particular field to perform some specialized service. OMB 78-11, Guidelines for the Use of Consulting Services, further defines consulting services to mean those services of a purely advisory nature relating to the governmental and agency program management. [23:15]

b. **Contractor Support Services**

These are services of a white collar, professional nature involving performance in support of Navy Programs, such as scientific/technical studies and analysis, test and evaluation support, budgetary/financial analysis, ADP support, reliability and maintainability support, cost analysis, and general management support. [23:15]

c. **Commercial or Industrial (C/I) Activities Support Services**

These are overhead or program support services which are not essential to the management control of Navy programs. The major thrust of this effort is in the blue collar area such as janitorial, transportation, or general services. However, C/I services may involve efforts similar to those described above as contractor support services. The major difference between these two types of services is that the C/I activities support services call for contracting out of entire functions while CSS involves the contracting out of specific effort or task in support of a continuing in-house activity or capability. [23:16]

3. **Personal Services Versus Nonpersonal Services**

All service contracts are further categorized as either personal services or nonpersonal services. With the exception of Expert and

Consultants employed by personnel officers in accordance with the Federal Personnel Manual, personal service contracts are not permitted. Nonpersonal services are an approved resource that may be used in the accomplishment of assigned missions by contracting out for contractor support services (CSS), Commercial or Industrial (C/I) Activities support services, or consultant services procured by contracting officers in accordance with the DAR. The distinction between personal and nonpersonal services is not always clear and many factors are considered in reaching a determination as to whether a particular service, situation, contract, or contract performance is personal or nonpersonal in nature. However, in general, a personal service contract is one in which the contractor or his employees are, in effect, Government employees. This situation occurs when a "master-servant" or "employer-employee" relationship exists. [23:17]

II. BACKGROUND

A. NEED FOR THE SERVICE CONTRACT ACT (SCA)

The need for the SCA is well stated in the report issued by the House Education and Labor Committee on September 1, 1965 (H. Rept. No. 948), as follows:

Many of the employees performing work on Federal service contracts are poorly paid. The work is generally manual work and in addition to craftwork, may be semiskilled or unskilled. Types of service contracts which the bill covers are varied and include laundry and drycleaning, custodial and janitorial, guard service, packing and crating, food service, and miscellaneous housekeeping services.

Service employees in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws. The counterpart of these employees in Federal service, blue-collar workers, are by a Presidential directive assured of at least the Fair Labor Standards Act minimum. Bureau of Labor Statistics surveys of average earnings in service occupations in selected areas in 1961 and 1962 show, however, that an extremely depressed wage level may prevail in private service employment. In contract cleaning services, for example, in some areas less than \$1.05 an hour was paid. Elevator operators earned low rates, varying from \$0.79 to \$1.17 an hour. Service contract employees are often not members of unions. They are one of the most disadvantaged groups of our workers and little hope exists for an improvement of their position without some positive action to raise their wage levels.

The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages.

B. PURPOSE OF THE SCA

The purpose of this bill is to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies. The service contract is the only remaining category of Federal contracts to which no labor standards protection applies. Federal construction contracts require compliance with labor standards under the Davis-Bacon Act and related statutes. Federal supply contracts also provide labor standards under the Walsh-Healey Public Contracts Act.

The bill is applicable to advertised or negotiated contracts in excess of \$2,500, the principal purpose of which is to furnish services through the use of service employees. Service employees are defined in the bill as guards, watchmen, and any person in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations. Typical services furnished would also include laundry and drycleaning, custodial, janitorial, cafeteria, food, and miscellaneous housekeeping. [35]

Persons covered by the bill must be paid no less than the prevailing rate in the locality as determined by the Secretary of Labor, including fringe benefits as an element of the wages. No less than the applicable minimum wage provided in the Fair Labor Standards Act, as amended, can be paid. In determining the prevailing rate in the locality, the Secretary will consider the compensation paid persons engaged in such service-type work and work of a similar type in the locality. The Secretary of Labor, in determining the locality for such purpose, would take a realistic view of the type of service contract intended to be covered by the determination.

In addition, the bill requires that work shall not be performed under unsafe or unsanitary working conditions.

Enforcement procedures are provided in the bill including the withholding of payments due the contractor under the contract and payments to the employees of amounts due them; suit by the United States against the contractor or surety to recover the amount of underpayment; cancellation of the contract for any violation with the contractor liable for any resulting cost to the United States; authority for the Secretary of Labor to list and withhold awarding further contracts to contractors violating this bill for up to three years; and authority to issue regulation under sections 4 and 5 of the Walsh-Healey Public Contracts Act to enforce this bill. The authority to list contractors violating this act specified in the bill and to recommend no further contracts of the United States be awarded such violators is subject to the provision of sections 4 and 5 of the Walsh-Healey Public Contracts Act. Contractors would therefore be entitled to the notice, hearing, and other procedures provided for in said act.

There are certain specific exemptions from coverage listed in section 7 including contracts covered by the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, the Interstate Commerce Commission, the Communication Acts of 1934; also, contracts for public utility services, direct employment by individuals, and for postal contract stations.

C. SERVICE CONTRACT ACT - AMENDMENT OF 1972 P. L. 92-473

1. Background

Congress held oversight hearings on the administration of the SCA in 1971-1972. The ultimate findings of the Subcommittee on

Labor of the House Committee on Education and Labor were: [3:75]

a. A substantial disparity in wages and fringe benefits had developed between Federal Wage Board employees and service contractor employees (performing the same duties).

b. Labor management instability has arisen because of the failure to take the existence of collective bargaining agreements into account in wage and fringe benefit determinations.

c. The practice of rebidding contracts yearly either without wage and fringe benefit determinations or with unrealistically low determinations created chaos for reputable contractors and great hardships for employees.

d. The Secretary of Labor stretched his discretion in administering the Act far beyond what Congress had intended, and

e. The Department of Labor failed to make wage and fringe benefit determinations for almost two-thirds of the contracts subject to the Act.

As a result of these Hearings, a proposed amendment to the SCA was introduced, passed and signed into law by President Nixon on October 9, 1972.

2. Purpose

The purpose of the amendment was to bring about more equitable and more efficient administration of the SCA.

3. The Amendment

The amendment contained the following new features:

a. Provides assurance that employees working for service contractors under a collective bargaining agreement will have wages

and fringe benefits under a new service contract no lower than those under their current agreement;

b. Requires the Secretary of Labor to take into account in determining the prevailing rate, wage and fringe benefit increases provided for by prospective increases in collective bargaining agreements;

c. Requires the Secretary of Labor to consider wage board rates in determining the rates for service contract employees;

d. Ordinarily requires successor contractors to pay service employees wages and fringe benefits that are no lower than their wages and fringe benefits under the current contract;

e. Mandates that the Secretary of Labor issue wage determinations for all government service contracts under which more than five employees are employed; and

f. Strengthens the procedures for the debarment of contractors who have been found to have violated the act.

D. SERVICES CONTRACT ACT - AMENDMENT OF 1976, P. L. 94-489

1. Legislative History

The subcommittee on Labor-Management Relations has conducted numerous hearings to oversee the functioning of the SCA. The first set of oversight hearings were held during the 92nd Congress. The seriousness of the problems discovered led to the amendments of 1972 (P. L. 92-473). Additional oversight hearings were held in 1974, 1975, and 1976. These hearings and the court decisions discussed below convinced the Subcommittee that it was necessary to take legislative action to clarify the Act's coverage provisions as they could affect "white collar" employees engaged in the performance of government service contracts. [37]

2. Judicial Review

The purpose of this amendment was to preserve the status quo prior to the decisions in *Descomp v. Sampson* and *Federal Electric Corporation v. Dunlop*, by clarifying what was meant by the term "service employee".

In *Descomp v. Sampson*, the court held that "white collar" employees were not covered by the Act. This holding was the subject of oversight hearings in 1974 by the Subcommittee on Labor-Management Relations, which categorically rejected the narrow construction placed on the Act by the *Descomp* holding. In its report to the Committee on Education and Labor it said as follows:

That the court in *Descomp* placed a construction upon the language of the statute that is clearly not there is well supported by statements of Congressional intent in the 1974 Oversight Hearings. As Chairman Thompson stated:

"With respect to the clerical employees it was clearly the intent of the committee that they be included...in the absence of language to the contrary, we feel that the Secretary should give the Act a liberal construction.

Notwithstanding specific language making it clear or naming them as white collar workers, it was and is our intent that all service contract employees be included, including the keypunch operators and others." [37]

Descomp, therefore, established an incorrect test for defining a service employee based upon a distinction between so-called "blue" and "white" collar employees. [37]

The Department of Labor has consistently included both "blue collar" and "white collar" employees engaged in the performance of government service contracts, other than bona fide executive, administrative

and professional employees, within the definition of "service employees" for purposes of the Act.

3. Clarification of the Scope of the Term "Service Employee"

The amendment simply makes it clear that both "blue collar" and "white collar" employees engaged in the performance of government service contracts, other than bona fide executive, administrative and professional employees are to be considered "service employees" for purposes of the Act.

At the time of the original Act, service workers were numerically mostly "blue collar", but there were "white collar" workers as well, and their coverage was intended by the Congress. This was recognized by former President Nixon in his statement when signing the 1972 amendments. He said: "Typical of the services covered are food services, custodial, grounds maintenance, computer services and support services at military installations".

The amendment does not exclude any of those workers covered under the previous 8(b) definition which read as follows:

(b) The term "service employees" means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations, and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons. The amendment also imposes on the Secretary the obligation to give due consideration to General Schedule rates as well as Wage Board rates. [37]

Without specifically endorsing or adopting them, current regulations of the Department of Labor pertaining to labor standards for service contracts [69] are of some assistance in clarifying the meaning of

"service employee". In addition to the statutory limitations regarding contract coverage as to "principal purpose" and dollar amount of the contract, the regulations describe applicability of the protections afforded by the Act in terms related to actual performance of the "specified contract services". This description imposes no limitations on coverage based on the "Classification Act" or its exemptions, and accordingly makes no distinction based amply on "blue" and "white" collar classifications.

It is this description that these amendments are trying to reach. Thus the regulations stress that covered employees are those who fall into one "of the classes who actually perform the specific service called for by the contract", or, the "classes of service employees directly engaged in performing specified contract services", making the often used "white collar" v. "blue collar" distinctions inappropriate in further limiting the protections of the Act.

The Committee concurs with the testimony of witnesses that coverage of "white collar" service employees is integral to the remedial purposes of the Act. In the amendment, the committee reiterates the position that workers engaged in the performance of government service contracts are entitled to the decent standards this Act has brought to the field.

E. MAJOR DECISIONS IMPACTING ON THE SCA

The contents of this section attempt to identify the significant decisions rendered by the Comptroller General of the United States, Attorney General of the United States, Board of Contract Appeals and

General Accounting Office. The majority of this section is an excerpt from an article entitled "The Service Contract Act of 1965, A Review" by Brian M. Kingston, Assistant Counsel, Naval Supply Systems Command, Washington, D.C. [24]

1. Supply versus Service

The supply versus service issue has emerged in the course of protests to the Comptroller General as well as in court litigation. It relates to the larger question of who initially determines whether the SCA is applicable to a particular procurement.

Section 4.4 of DOL regulations requires the contracting agency to notify DOL within a certain timeframe of its intent to let any service contract "which may be subject to the Act". The DAR at 12-1005.2(b)(1)(a) places this obligation with the contracting officer and restates the conditional phrase: "which may be subject to the Act". This language would indicate that it is the contracting agency which makes the initial determination as to the applicability of the SCA to a procurement. Two Comptroller General decisions and a federal court have recognized that this coverage determination originates with the agencies.

In 53 Comp. Gen. 412 (1973), GAO considered the legality of an Air Force contract for aircraft overhaul and maintenance which was awarded without SCA provisions on the grounds that the SCA did not apply. The Air Force considered the procurement to be one for supplies and not for services and had accordingly included Walsh-Healey provisions in the Contract. When DOL after award determined that contract coverage should have been under the SCA and not Walsh-Healey, the legality of the contract was called into question. GAO noted that DOL's

regulatory scheme provided for the initial determination of SCA applicability to be made by the procuring agency. When the agency's determination as to coverage is negative, then there is "no duty" to apply the SCA to the contract. GAO found on the facts that the Air Force had a reasonable basis for its belief that the procurement was not subject to the SCA, was not on any "effective notice" before award of DOL's contrary position, and acted in good faith in its judgment before award as to proper statutory coverage. GAO concluded that the contract had not been awarded illegally.

A federal district court also deferred to the discretion of the agency to select the appropriate labor statute to be applied to the contract. On the same facts as in the foregoing protest, the Court would not disturb an award which was made in good faith with Walsh-Healey rather than SCA coverage, even though the agency's pre-award determination was subsequently found to be incorrect. Curtiss-Wright Corp. v. McLucas, C.A. No. 807-73 (D.N.J. August 27, 1974) (Unpubl. Opinion).

The Air Force did not fare as well in a later protest where it again maintained that a procurement was one for supplies rather than services. In Hewes Engineering Company, Inc., 74-1 CPD 112 (1974), the protest came before award when the Air Force had inserted Walsh-Healey and not SCA provisions into the solicitation. While GAO continued to acknowledge the agency's prerogative to make the initial judgment as to labor standards applicability, it found that the Air Force had been on notice by DOL of the potential application of the SCA to the solicitation. Under those circumstances, the Air Force must "take into account" the views of DOL which are known during the solicitation

phase, unless those views are "clearly contrary to law". GAO recommended the Air Force to submit the question to DOL before award for resolution.

These cases suggest that the contracting officer should investigate SCA coverage questions and determinations, especially where a solicitation may later be subject to amendment, if he is put on notice by DOL, bidders or otherwise of new or changed coverage. In cases of uncertainty, DOL will resolve the question by way of response to an agency's submission of an SF 98. The SCA, discussed in Section X, would require the reporting of basic coverage questions to the procuring agency's labor advisor for guidance.

2. Locality

Sections 2(a)(1) and (a)(2) of the SCA authorize the Secretary of Labor to make wage determinations in accordance with prevailing rates for service employees "in the locality". The sections do not, however, amplify what is meant by "locality". Accordingly, Section 4.163 of the DOL regulations attempts to clarify the meaning of the term:

The term 'locality' has reference to geographic space. However, it has an elastic and variable meaning and, if the statutory purposes are to be achieved, must be viewed in the light of the existing wage structures which are pertinent to the employment by potential contractors of particular classes of service employees on the kinds of service contracts which must be considered, which are extremely varied.

The regulations conclude that it is not possible to devise any precise formula for the term, and each determination must be made "upon the basis of facts and circumstances pertaining to that determination".

Despite this seemingly flexible approach to the topic, DOL has resolutely adhered to a singular interpretation of "locality".

There is no difficulty with the application of the locality requirement where the services furnished under a service contract are to be performed at a Government facility, as is the case with guard services, food service, grounds maintenance, etc. In this case, DOL's wage determination for the service employees is based simply on the rates for similar employees prevailing in the locality of the Government facility. The problem arises when the services are to be performed "off-site", that is, at the contractor's place of business, which may be located far away from the Government installation being serviced. Certain keypunching, drafting and testing work are examples of off-site service contracts. Even in these latter cases, however, DOL has consistently used for its wage determinations the rates prevailing at the situs of the Government customer installation, and not at the actual place of performance. Off-site contractors complain that they are forced to pay the rates prevailing in the customer location which are often higher than those prevailing in their own localities.

DOL's application of the locality principle in the SCA has been tested in protest and in litigation. In Descomp, Inc., 53 Comp. Gen. 370 (1973), GAO reviewed the legality of DOL's use of prevailing rates in the locality of a federal installation rather than where the contract was to be performed, the contractor's facility. Citing legislative history and federal procurement laws, GAO questioned DOL's wage determination practice and states that it had an "adverse impact" on Government procurement of services by increasing costs. The wage rates in the contractor's locality in this case were far lower than those in the locality of the customer installation. GAO could not conclude, however, that

DOL's application of "locality" was prohibited by the language of the SCA and denied the protest.

On two other occasions, the same contractor on similar procurements challenged DOL's position as to the proper locality for purposes of wage determinations. In Descomp, Inc., 74-1 CPD 44 (1974), GAO restated its objection to DOL's position but conceded that it was "the settled interpretation of this issue at the present time". The contractor obtained a more satisfactory opinion from a federal district court in Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D.C. Del. 1974). Finding that the interpretation applied by DOL as to "locality" was unrealistic and tended to diminish full and free competition as contemplated by the procurement laws, the Court concluded that such interpretation was in error. However, there was no order expressed in the decision for remedial action to be taken by DOL on this score.

3. Successorship

A contract is deemed to be a successor contract within the meaning of Section 4(c) of the SCA if it is for substantially the same services as and "succeeds" to a predecessor contract. There is a lack of specificity in Section 4(c) as to whether the successor contractor, to be considered a "successor", must use the same service employees as the predecessor or must be in the same location as the predecessor.

DOL imposes the successorship obligation regardless of whether the successor hires the predecessor's employees or whether the successor is situated in a separate location from the predecessor. Even under these circumstances, if the predecessor had a collective bargaining agreement with its employees specifying wage rates and fringe benefits,

the successor must pay at least these rates under his successor contract. He is also obligated to pay any prospective wage and benefit increase that might be contained in the predecessor's agreement.

This application of Section 4(c) of the SCA was protested to the Comptroller General in A-V Corporation, 74-1 CPD 111 (1974). A Houston contractor succeeded to two service contracts for film processing and the processing was to be performed at the contractor's Houston location. The services under the predecessor contracts were performed in California and New York. DOL based its wage determination for the successor contract on collective bargaining agreements which pertained to the predecessor contracts. The successor had a collective bargaining agreement with its service employees, but its rates were lower than those contained in the predecessor's agreements.

GAO criticized this application of the 4(c) successorship rule by DOL and stated that such importation of collective bargaining agreements from other localities tended to increase costs and reduce competition. Section 4(c) should only apply, GAO asserted, where the place of performance of the predecessor and successor contracts is the same. While finding the DOL's practice was "subject to question", GAO resolved that it was not prohibited by Section 4(c) of the SCA. The Houston contractor's protest was denied.

A successor contractor prevailed in a dispute with a service employee union regarding the extent and scope of applicability of a predecessor's contract to a successor. In Service Employees' International, Local 36 vs General Services Administration, C.A. No. 77-920 (D.C.E.D. Pa. Oct 31, 1977), the Court limited the application of the predecessor

contract to its wage rates and fringe benefits, refusing to attach its other terms and conditions (e.g., arbitration clause) to the successor contract. Also, no obligation was found to exist under Section 4(c) of the SCA for the successor to hire the employees of the predecessor.

In January 1977, the Office of Federal Procurement Policy (OFPP) issued a proposed policy interpretation of the SCA for the use of all federal procuring agencies. The proposed interpretation, which was to be effective April 1, 1977, would harmonize the "locality and successorship" areas under the SCA with those interpretations advanced by GAO and discussed in the decisions noted above. However, as a result of the objections raised by DOL, organized labor and members of Congress, the proposed interpretation was cancelled for further study of the issues involved.

OFPP continued to intercede in behalf of the contracting agencies and effect changes in SCA policies and procedures which would be beneficial dollar-wise and administration-wise to Federal procurement of services. These attempts by OFPP to overrule the Secretary of DOL, and effect such changes have been met with strong resistance. This dispute was elevated to President Carter who referred it to the Justice Department.

The Justice Department ruled narrowly in favor of the Labor Department in its dispute with OFPP on who has the authority to interpret the wage rate laws--who may decide whether a federal contract falls under the Service Contract, Walsh-Healey, or Davis-Bacon Acts. In a letter responding to President Carter's request of October 30, 1978 for an opinion on the dispute, Attorney General Griffin B. Bell concludes that "the

powers of the Administrator of OFPP were not intended to extend to the construction of the substantive provisions, including questions of coverage, of the three statutes to which you refer".

"In conclusion," the Attorney General told the President, "the question whether a particular class of contracts is covered by the Walsh-Healey or Service Contract Acts is one for the decision of the Secretary of Labor. In making that decision, the Secretary must exercise discretion within the broad limits of the language of the two statutes."

4. Reviewability

With the enactment of the 1972 Amendments to the SCA, DOL became more diligent and productive in its issuance of wage determinations. This increase in determinations highlighted the key question of the authority for outside review of such determinations.

A significant challenge to DOL's implementation of the SCA was made in Descomp vs Sampson, supra. In a GSA contract for keypunching services, the plaintiff contractor took issue with DOL's position that these services were subject to the SCA, that keypunchers were "service employees", and argued that DOL's ruling on "locality" was in error. Relying on the provisions of the Administrative procedure Act (5 U.S.C. 551), and the decisions of Scanwell Laboratories, Inc. vs Shaffer, (C.A.D.C.) 424 F. 2d 859 (1970), and Keco Industries, Inc. vs United States, 428 F. 2d 1233 (1970), 192 Ct.Cl. 773 (1970), the court held that DOL wage determinations are judicially reviewable to the extent that they may violate the SCA or DOL's own regulations promulgated under it.

The Court applied two standards of review to the issues raised by the Plaintiff. On the questions of whether the contract was one for

services and whether the keypunchers were service employees, the Court confined its review to a "rational basis" test because such determinations were questions of fact where DOL was permitted a large degree of administrative discretion. As to the propriety of DOL's "locality" ruling on the contract, a broader "substitution of judgment" test was used on the basis that this determination went directly to statutory interpretation, congressional intent, and was a question of law.

While finding that the contract was one for services and within the coverage of the SCA, the Court set aside DOL's determination that the keypunchers were service employees, essentially because they were "white collar" employees whereas the SCA's purview was the "blue collar" employee category. DOL's determination as to the proper locality to be used for setting contract wage rates was also invalidated as a result of the Court's examination of the congressional history of the SCA and the federal procurement laws. The Plaintiff was also found to have the requisite standing to challenge DOL's wage determination because as a Government contractor it was within the zone of interest to be protected by the procurement statutes which were considered relevant to the case.

The ruling in Descomp that the SCA did not cover white collar employees was, of course, legislatively overruled by the 1976 amendments to the SCA which extended coverage to such employees. The Court's judgments on standing and reviewability however, would appear to remain as good law. The impact of the Descomp decision as to the locality issue is questionable in light of DOL's adherence to its own application of that rule.

Two other federal jurisdictions dealt squarely with the subject of the reviewability of DOL's wage determinations issued pursuant to the SCA. In Curtiss-Wright Corp. v. McLucas, 364 F. Supp. 750 (D.N.J. 1973), the Court stated that the Secretary of Labor's determination whether or not a particular Government contract is subject to the SCA is not judicially reviewable. Conversely, in Federal Electric Corporation v. Dunlop, 419 F. Supp. 221 (M.D. Fla. 1976), vacated as moot No. 76-2507 (5th Cir. - January 21, 1977), it was held that the Secretary's judgment on the applicability of the SCA to job classifications must have "warrant in the record" and a reasonable basis in law. As in Descomp, the Court in Federal Electric had ruled that the SCA's coverage did not include white collar employees and this ruling was similarly vitiated by the 1976 SCA Amendments.

Another aspect of the reviewability issue is the judicial reaction to those occasions when DOL does not make wage determinations after requests therefor. In Kentron Hawaii Ltd., et al. vs Warner, 480 F. 2d 1166 (D.C. Cir 1973), the District of Columbia Circuit recognized DOL's discretion not to make a wage determination for a Navy procurement covered by the SCA. While taking notice of the restrictions in the 1972 SCA Amendments on DOL's discretion not to issue wage determinations, the Court found that DOL had properly invoked the SCA's Section 4(b) exemption powers in declining to render a determination. Two factors operated to support this conclusion: 1) the procurement was multifaceted in terms of classifications and locations and DOL lacked sufficient resources to render a timely determination, and 2) the Navy had violated the SCA and the ASPR (now DAR) in omitting from its SF 98 submitted to DOL wage information which was readily available to it.

On the procedural question of standing, contractor employees and their unions are given judicial standing to oppose DOL wage determinations that adversely affect them. International Union of Operating Engineers vs Arthurs, supra; International Association of Machinists & Aerospace Workers vs Hodgson, supra. Such standing is afforded to service employees and their representatives because they are arguably within the zone of interests to be protected by the labor standards statutes. It appears, however, that no standing is recognized under the SCA unless the employees have been affected by agency action relative to their employer's contract with the Government. AFGE vs Dunn, 561 F. 2d 1310 (9th Cir. 1977).

The Comptroller General has assumed a posture of nonintervention with DOL wage determinations. Review of a wage determination issued under the SCA was declined in 48 Comp. Gen. 22 (1968) on the basis of GAO's conclusion that the SCA does not provide for such review. The contractor involved had protested a contract wage rate minimum which had been established by DOL. Any damage sustained as a result of compliance with the wage determination which was issued pursuant to law, GAO found, was "irremediable".

Another important aspect of this Comp. Gen. decision was the significance of DOL's wage determination as being the minimum rate to be paid under a service contract. If a contractor finds that he cannot employ labor at the DOL minimum rate in order to perform the contract but must pay higher rates, this does not affect the validity of DOL's wage determination. DOL's determination of minimum rates does not constitute representation that labor can be obtained by the contractor at those rates. Accord,

What-Mac Contractors, Inc., 76-2 CPD 500 (1976). Further, a contractor is still obligated to pay a minimum rate set by DOL under the SCA even though the rate is higher than that contained in a collective bargaining agreement between the contractor and his employees.

5. GAO Protests and the SCA

While the Comptroller General has refrained from scrutinizing wage determinations issued by DOL, he has shown no such restraint with the procuring agencies in compelling their compliance in recent years with the provisions of the SCA. Most of the issues in this area protested to GAO related to the failure of the agencies to compete their service contracts with all of the SCA requirements satisfied. More particularly, agencies have awarded service contracts based on solicitations without wage determinations or with inoperative wage determinations.

Perhaps the keystone decision of the Comptroller General in the adaptation of the SCA to the procurement process is that of Dynateria, Inc., 75-2 CPD 36 (1975), *aff'd sub nom.* Tombs & Sons, Inc., 75-2 CPD 332 (1975). In this case, the Air Force issued an invitation for bids (IFB) for food services, and the IFB contained a wage determination from DOL. Two weeks after bid opening, DOL issued a revised wage determination to the Air Force to be applicable to the IFB, the new determination containing a higher wage rate. Three months passed before award was made to the low bidder, and the contract awarded incorporated the original wage determination of DOL, not the revised one which was transmitted after bid opening. However, shortly after award the parties mutually agreed to amend the contract and incorporate the revised wage determination and to adjust the contract price upwards to reflect the higher wage rate.

Raising the ten-day rule in the DOL regulations and in DAR, the Air Force asserted that it was not obligated to give effect to the revised wage determination promulgated after bid opening. Acknowledging that the Air Force may have been procedurally correct, GAO nevertheless reviewed the award without inclusion of the revised wage determination to be so improper as to render the procurement nugatory. Finding that the revised determination was available "well before award", GAO noted that the IFB should have been cancelled so as to incorporate the revision. What was particularly offensive was that all competitors were using the old determination in calculating their bids, whereas the amended contract contained the new determination with different rates which had been known before award. GAO stated:

The rule that the contract awarded should be the contract advertised is well established. Prestex, Inc. vs United States, 320 F. 2d 367, 112 Ct. Cl. 620 (1963). Competition is not served by assuming that the new wage rates would affect all bids equally. It may well be that another bidder was already paying wages at or above those in the new determination so that his prices would not have increased at all. Thus, it is possible that the contract as amended no longer represents the most favorable prices to the Government. Speculation as to the effect of a change in the specifications, including a new wage determination is dangerous and should be avoided where possible. The proper way to determine such effect is to compete the procurement under the new rates.

GAO did not rule on whether or not the contract should have been subsequently amended. Rather, the transgression was found in utilizing the revised rates only after award when they were available beforehand for competition, and not cancelling the IFB to so compete them. At the time of GAO's decision the base term of the contract had already been completed. However, there were options on the contract which it was recommended not be exercised so that the requirement could be resolicited using the revised wage determination.

Almost as substantive as the issues in Dynateria were those treated in a request for reconsideration in Tombs & Sons, Inc., 75-2 CPD 332 (1975). The contract awardee argued in its reconsideration request that there was no evidence that all bidders had not used the same wage rates in computing their bids. GAO rejected that argument as misplacing the burden of proof, reiterating that it was the uncertainty of the effect of the omitted wage rates which tainted the procurement. Amending the contract just after award to reflect revised wage rates known before award was tantamount to awarding a contract different from the one advertised. In terms of remedy, GAO had not been aware that just after its Dynateria decision the Air Force had exercised the first option on the contract. Consequently, GAO ruled that the option contract should be terminated for convenience and the requirements resolicited in order to preserve the integrity of the competitive bid system.

Despite the policy set forth in the procurement regulations against cancelling solicitations after the opening of bids, GAO will recommend cancellation when failure to do so will result in improper wage determinations being applied to Government contracts. In Square Deal Trucking Company, Inc., 75-1 CPD 103 (1975) an agency received a DOL wage determination just after bid opening, but well in advance of award. Since the agency proposed to award the contract on a basis of an old wage determination issued ten years prior to the procurement, GAO questioned the decision to proceed to award without consideration of the latest wage determination. Notwithstanding the agency's citation of the ten-day rule, the agency could not "automatically rely on this type of provision" to ignore late wage determinations, but instead must make

a "positive finding" as to the time availability to notify bidders. GAO recommended that the contracting officer make a determination, before proceeding with the procurement, of the interests to be protected under the SCA by cancelling the IFB. Affording protection to service employees and thereby furthering the purposes of the SCA qualifies as a "compelling reason" under the procurement regulations to cancel a solicitation after opening and to resolicit.

Cancellation of solicitations after bid opening in order to permit bidders to recompile on the basis of a newly issued SCA wage determination have accordingly been upheld by GAO. United States Service Associates, Inc., 77-1 CPD 267 (1977); Suburban Industrial Maintenance Co., 77-2 CPD 198 (1977). These decisions introduce a degree of risk on the absolute reliance of the ten-day rule by procuring agencies. The danger of cancellation is manifest when an agency receives a wage determination after opening and before award but intends to incorporate it by amendment into the contract soon after award. It is similarly perilous to allow a low bidder to adjust his bid before award in order to incorporate a wage determination received after bid opening. Suburban Industrial Maintenance Co., supra. Reliance on the ten-day rule would appear to be sound when a solicitation contains a wage determination based on a duly filed SF 98 and the intention is to award and perform the contract based on that determination, regardless of notice of a new wage determination after bid opening.

Derelection of duty in noncompliance by agencies with the provisions of the SCA and the DAR and resulting in contracts with improper wage determinations can also be a basis for termination. In High Voltage

Maintenance Corp., 76-2 CPD 473 (1976), the Air Force in its SF 98 had not informed DOL before a RFP closing date of a collective bargaining agreement pertinent to the procurement. DOL subsequently learned of the applicable agreement but due to the lack of timely notice of it was unable to issue the correct wage determination until after the Air Force had made the award. GAO recommended termination of the contract which was in effect pursuant to an option, based on the Air Force's "incomplete and misleading" SF 98 and on its failure to comply with the SCA regulatory requirements. GAO stated that it must accord "great deference" to DOL's administration of the SCA under its regulations.

A Navy contract was also terminated where the Navy neglected to give timely notice to DOL of an applicable collective bargaining agreement which was to be applied to a successor contract. But for the agency's failure to give proper notice, DOL would have issued a wage determination before award reflecting the collective bargaining agreement which could have been used by all bidders as a basis for competition. Government Contractors, Inc., 77-2 CPD 240 (1977), *aff'd on reconsideration*, Government Contractors, Inc., 78-1 CPD 146 (1978).

Notice of new collective bargaining agreements before award and the agency's attendant obligations concerning them should be distinguished from any anticipated changes to such agreements after award. In the latter case, any anticipated new or revised agreements which may be reached during performance have no effect on a solicitation which contains then current wage determinations. Suburban Industrial Maintenance Co., 78-1 CPD 173 (1978).

The principles enunciated in GAO's Dynateria decision for formally advertised procurements are equally applicable to negotiated procurements. Minjares Building Maintenance Company, 76-1 CPD 168 (1976). In Minjares, GAO ruled that where an agency receives a revised wage determination after the conclusion of negotiations but prior to award, it should reopen negotiations to permit all offerors to revise their proposals based on the new rates. In this situation an agency cannot assume that the revised determination would have an equal effect on all offerors and their relative standing. But see 52 Comp. Gen. 686 (1973) where GAO deferred to an agency's estimation that a new wage determination would not have such a significant impact on cost proposals as to justify reopening negotiations. See also Management Services Incorporated, 76-1 CPD 74 (1976) for an interesting discussion in an SCA covered procurement of the cost evaluation of a successor's proposal as against that of the predecessor in the successorship area.

Protests involving SCA related issues have been considered by GAO on the merits even when untimely filed. 53 Comp. Gen. 412, supra, High Voltage Maintenance Corp., supra. Because of the frequency of procurements under the SCA and the interests warranting protection under that statute, GAO deems these protests to raise "significant issues" and to fall within the exception to its timeliness rule in 4 C.F.R. 20.2 (1976).

6. Contract Disputes

Activity under the SCA at the Contract Appeals Boards has been sporadic, due in part to the standard price adjustment clauses which allow adjustments to contractors for increases in minimum wages and

other wage rates. The ASPR clause 7-1905 provides for automatic adjustments when the legal minimum wage is increased pursuant to the Fair Labor Standards Act (FLSA), and when revised wage determinations are effective under the SCA at the time of option renewals or contract extensions. Some significant decisions have been rendered by the Boards pertaining to the SCA, however, involving the adjustment clauses and other issues.

The Navy and a janitorial service contractor brought a dispute to the ASBCA on the effect of an SCA wage determination on contract performance. In C & S Service Corporation, ASBCA No. 20778, 76-1 BCA 11,889, the Navy defaulted the contractor when he abandoned the contract in the face of performing at a loss. The solicitation and resulting contract had contained a wage determination which the contractor asserted to be inaccurate because he could not find an adequate labor force to perform at that rate, but only at higher rates. The prevailing wage rate in the locality of performance, the contractor found, was higher than that contained in the wage determination.

The ASBCA first proclaimed that it was not the proper tribunal for reviewing the correctness of wage determinations issued by DOL, citing United States v. Binghamton Construction Company, Inc., 347 U.S. 171 (1954), a Davis-Bacon Act case which the Board said "applied analogously" to the SCA. The Board did consider the default termination for failure to pay the prevailing wages to be within its purview and denied the appeal for lack of excusability. The wage determination issued by DOL and included in the contract, it was held, sets out only a minimum rate which must be paid and is no guarantee that the contractor

will be able to hold its wages to that minimum. Total reliance by bidders on specified minima in a wage determination in computing their bids is not justified. Accord, Fred A. Arnold, Inc., ASBCA No. 18915, 75-2 BCA 11,496.

Other important contract disputes decisions by the Boards relating to the SCA are synopsized as follows:

a. An omitted price adjustment clause was incorporated into a contract by operation of the Christian doctrine in order to compensate a contractor during option periods for higher wage determinations as a result of a collective bargaining agreement. Transcontinental Cleaning Company, NASA BCA No. 1075-9, 78-1 BCA 13,081.

b. A final decision by DOL during contract performance on conformable rates pursuant to ASPR clause 7-1903.41(a) was not compensable as an adjustment under ASPR clause 7-1905. International Service Corporation, ASBCA No. 20971, 77-1 BCA 12,396.

c. The Army's affirmative erroneous assurance to a contractor of the inapplicability of the SCA to a service contract which was subsequently covered by the SCA was cause to convert a termination for default into a termination for convenience. Blackhawk Hotels Company, ASBCA No. 133333, 68-2 BCA 7265.

d. In the absence of a contract price adjustment clause a contractor would be entitled to a price increase, as a constructive change, resulting from a higher wage determination being applied to an option period. Geronimo Service Company, ASBCA No. 14686, 70-2 BCA 8540.

e. The Air Force's assessment against a defaulted contractor of the excess costs of reprocurement based on then current SCA rates was

upheld. Golden Gate Building Maintenance Co., ASBCA No. 12202, 68-1 BCA 6739.

f. In the absence of a price escalation clause in the contract, the Board had no jurisdiction of a claim for a price adjustment due to the increase in FLSA rates during contract performance, the FLSA increase not being a change within the meaning of the Changes Clause.

Manpower, Inc., GSBCA No. 2299, 67-1 BCA 6281; Accord, Surles-Rupert Dodge, Inc., IBCA No. 65-6-67, 68-1 BCA 6744.

g. In a dispute involving the Davis-Bacon Act, the issue of alleged underpayments by the contractor to employees was subject to review under the Disputes clause. Ventilation Cleaning Engineers, Inc., ASBCA No. 16704, 73-2 BCA 10,210.

7. Enforcement

The SCA in Sections 3, 4 and 5 provides for a variety of affirmative actions which may be undertaken by the Government to enforce its provisions. They are as follows:

a. Withholding from accrued payments due to contractors the amounts equal to underpayments of wages due to employees performing under the contract.

b. Holding withheld sums in a deposit fund for payment by the Secretary of Labor directly to the underpaid employees.

c. Administrative proceedings against contractors pursuant to Sections 4 and 5 of the Walsh-Healey Act and 29 C.F.R. 6 to determine violations of the SCA.

d. Cancellation by the contracting agency of contracts where violations are found and assessment of reprocurement costs against defaulted contractors.

e. Compilation and distribution by the Comptroller General of contractor ineligibility lists for contractors found to be in violation of the SCA and three year disqualification of such contractors from Government contracts.

f. Where accrued payments due to contractors are insufficient to satisfy the amount of wage underpayments, judicial action by the United States against contractors to recover the balance.

Section 3(a) of the SCA does not specify who is authorized to withhold accrued payments as a result of wage underpayments by contractors. The current DAR coverage at 12-1005.9 (1 July 1976) provides for withholding only upon written notice from DOL. This counteracts both DOL regulation 4.6(h) and DAR clause 7-1903.41(g) which authorize the contracting officer himself to withhold payments which he decides "may be necessary to pay underpaid employees". Under this clause, it would seem permissible for the contracting officer to withhold when he has direct knowledge of wage underpayments, through the documentary proof or otherwise. However, while a contracting officer may have the authority to withhold payments, he cannot also disburse them as it is only DOL under Section 3(a) which can make payments directly to contractor employees.

The procedures for DOL administrative proceedings on complaints for violation of the SCA are set forth in 29 C.F.R. 6, "Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Federal Service Contracts". Section 4(a) of the SCA embraces Sections 4 and 5 of the Walsh-Healey Act for its authority to administratively enforce the SCA.

The Comptroller General has addressed the question of what priority wage claims by unpaid or underpaid service employees possess under the SCA. Generally, such wage claims enjoy priority over competing claims. Unpaid wages take precedence over Internal Revenue Service liens when funds have been withheld by contracting agencies for wage underpayments. B-161460, May 25, 1967 (Unpubl); B-170784, Feb 17, 1971 (Unpubl); Ambrosia Construction Company, 76-1 CPD 88 (1976).

In addition to preference over tax liens, wage underpayment claims under the SCA also have priority over assignees and trustees in bankruptcy. Cascade Reforestation Inc., 77-1 CPD 250 (1977). However, once a contracting agency has applied withheld funds through DOL to the benefit of unpaid employees, it cannot look to the contractor's surety for reimbursement for the funds paid to the employees. 52 Comp. Gen. 633 (1973).

In United States vs Deluxe Cleaners & Laundry, Inc., 511 F. 2d 296 (4th Cir. 1975), the Court spoke to the question of what statute of limitation applied to the SCA in suits to collect underpayments. In Deluxe Cleaners, the Government instituted action under Section 5(b) of the SCA against a contractor for unpaid wages, but brought the action four years after the cause of action arose. The Court examined the two-year limitation period in the Portal-to-Portal Act of 1947 (29 U.S.C. 255(a)) which applies to judicial enforcement of the FLSA, Walsh-Healey Act and Davis-Bacon Act, but found no coverage of the SCA therein. It was also noted that the SCA contains its own provision for judicial recourse in Section 5(b) but that it specifies no limitation period. The Court concluded that in the absence of definitive statutory limitations,

Section 5(b) suits under the SCA are subject only to the general period of limitation of six years prescribed by 28 U.S.C. 2415.

III. FRAMEWORK

A. ESSENTIAL FEATURES OF THE SCA

1. Statutory Requirements

a. The Service Contract Act (SCA) applies to all contracts (and any bid specifications therefor) the principal purpose of which is to furnish services in the United States through the use of service employees.

b. Regardless of contract value, service employees working under contracts subject to the SCA shall be paid no less than the minimum wage specified in the Fair Labor Standards Act, as amended.

c. Successor contractors performing on service contracts over \$2,500 which succeed service contracts under which substantially the same services were performed shall pay services employees working under such contracts no less than the wages and fringe benefits (including accrued and prospective rates) provided for in any collective bargaining agreements between predecessor contractors and their service employees (unless such wages and fringe benefits are determined by a hearing to be substantially at variance with those which prevail for services of a character similar in the locality.)

d. Contractors performing on service contracts over \$2,500 to which predecessor contractors' collective bargaining agreements (labor agreements) are not applicable shall pay service employees working under such contracts no less than the wages and fringe benefits determined by the Department of Labor (DOL) in accordance with prevailing rates for

such employees in the locality. In the absence of such determination, no less than the minimum wage specified in the Fair Labor Standards Act, as amended.

e. DOL shall make a determination of minimum wages and fringe benefits (wage determination) to be paid/provided service employees based on prevailing rates in the locality or a predecessor contractor's labor agreement(s) whichever is applicable - whenever more than five (5) service employees are to be used under the forthcoming service contracts.

f. Every contract (and any bid specification therefor) shall contain a statement of the applicable General Schedule ("white collar") or Wage Board ("blue collar") rates which could be paid service employees working under such contract if they were Federal hires instead of contractor employees. DOL is to give "due consideration" to these rates when making the wage determination.

2. Statutory Exemptions

The Services Contract Act shall not apply to the following:

a. Any contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting or decorating of public buildings or public works;

b. Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act;

c. Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect, or where such carriage is subject to rates covered by Section 22 of the Interstate Commerce Act;

d. Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

e. Any contract for public utility services, including electric light and power, water, steam, and gas;

f. Any employment contract providing for direct services to a Federal agency by an individual or individuals; and

g. Any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations;

h. Any services to be furnished outside the United States. For geographic purposes, the "United States" is defined in Section 8(d) of the Act to include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, the Outer Continental Shelf Lands, as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island. It does not include any other territory under the jurisdiction of the United States or any U.S. base or possession within a foreign country.

i. Any of the following contracts exempted from all provisions of the Act, pursuant to Section 4(b) of the Act, which exemptions the Secretary of Labor, prior to amendment of such Section by Public Law 92-473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(1) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on

regularly scheduled runs of trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom; and

(2) Any contract entered by the U.S. Postal Service with an individual owner-operator for mail service where it is not contemplated at the time the contract is made that such owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness or accident.

B. MAJOR POLICY IMPLICATIONS

1. Promoting Socio-Economic Goals

A socio-economic program is defined as any executive, legislative or departmental program or policy that is basically designed to promote, advance or achieve social benefits through economic means. [1:106]
The Federal budget outlay for goods and services, especially for national defense, is so large that reformers have for many years looked to it as a vehicle for achieving social and economic as well as defense goals.

The Commission on Government Procurement recognized thirty-nine "socio-economic programs" as having impact on government procurement. Of the 39 socio-economic programs, four were cited as having significant cost impact in defense procurement. These are the Davis-Bacon and the related Service Contract Acts, the Minority Business Enterprise (Small Business Section 8(a)) Program and the Buy American Act. [1:107]

2. Increasing Private Sector Utilization

DOD Directive 4100.15 implements OMB Circular A-76. It prescribes DOD policy concerning reliance upon the private sector as follows:

The Department of Defense will depend upon both private and Government commercial or industrial sources for the provision of products and services, with the objective of meeting its military readiness requirements with maximum cost effectiveness . . .

The directive further states that:

. . . DOD components will be equipped and staffed to carry out effectively and economically those commercial and industrial activities which must be performed internally to meet military readiness requirements. All other required products or services will be obtained in the manner least costly to the Government (by contract, by procurement from other Government Agencies, or from DOD commercial or industrial activities).

In addition, DOD components must not rely upon private enterprise for those basic functions of management necessary to retain essential control over the conduct of their program, including:

- a. selection, training and direction of Government personnel,
- b. assignment of organizational responsibilities,
- c. planning of programs,
- d. establishment of performance goals and priorities, and
- e. evaluation of performance.

However, use of contract manpower for managerial, advisory, and other support services related to these internal functions is permitted where required, "provided that the Government's fundamental responsibility for controlling and managing its programs is not compromised or weakened".

OMB Circular A-76 and the Service Contract Act are interrelated with each other because the areas most suited for contracting out are

usually under the umbrella of the SCA. Examples of these areas are custodial services, guard services, food services, and refuse collection. It is because of this relationship that requires that OMB Circular A-76 be monitored for new developments. An example in early 1979, A-76 was extensively revised in ways which could affect the outcome in future cases. The new version contains specific standards for deciding whether savings are sufficient to justify continuing an in-house Government activity (thereby presumably putting limits on the discretion of procuring agencies). A 10% factor was specified favoring continuation of the status quo--a standard which would have been violated in many past cases where cost comparisons could show a mere 2% potential savings resulting from a shift from in-house services to contracting-out. [42:8]

3. Curtailling Wagebusting

The Federal Government has for many years contracted with American industry for a variety of services in support of Federal programs. In most cases, the contracts have been entered into as a result of competitive procurement procedures and they normally are subject to periodic recompetition.

Unwarranted reductions in salaries and fringe benefits can occur during competition for Government service contracts. Since the costs of wage and fringe benefits constitute the largest cost element in a service contract, competitors often have driven down wage rates to unrealistically low levels, even though the employees that will perform the work under the new contract are the same performing the work under the predecessor contract. [18]

The Service Contract Act of 1965, as amended, was enacted to prevent such "wage busting" practices. The Department of Labor sets and maintains wage determinations for these service employees.

IV. MAJOR SCA IMPLEMENTATION ISSUES

The task of implementing the provisions of the Services Contract Act has been left to the Agencies themselves. The Department of Labor has issued 29 CFR, Parts 4, 6 and 1910, providing for the administration and enforcement of the Act. The Department of Defense issued DAC #76-20 on 17 September 1979 to implement the current requirements of the SCA and DOL.

Both regulations are general in nature which requires discretionary interpretations by Contracting Officers and creates a "muddling-thru" process in order to implement the SCA. The following is a summary of the major issues and problems that were generated during this "muddling-thru" process.

A. PROBLEMS WITH APPLICABILITY AND COVERAGE OF THE ACT

This is the most basic issue and one which has caused the most confrontations between the DOD, DOL, and Industry. The basic question is: To what contracts does the SCA apply?

1. General

As stated in the Act, the SCA applies to all "...contracts (and any bid specification therefor) the principal purpose of which is to furnish services in the United States through the use of service employees". DOL interprets "principal purpose" as applying only to the furnishing of services "within the United States" and "through the use of service employees" considered separate and subordinate. This interpretation together with the broad definition of "service employee" and the

administrative and enforcement authority given DOL has resulted in DOL's determination of SCA applicability to many contracts for R & D, professional engineering, equipment overhaul and modification, and ADPE operation and maintenance. [22:3] Each of these areas were not considered to be covered under the SCA in the recent past and in fact are still being contested by DOD. The following is a discussion on the applicability question in each area:

a. SCA Applicability to Equipment and Modification

Over the years, DOD has in good faith determined that equipment overhaul and modification is principally the furnishing of supplies and materials and therefore subject to the Public Contracts Act. Throughout these same years DOL on a case-by-case basis has determined that such contracts are principally for services and subject to the SCA. However, DOL has not issued either a ruling and interpretation or a policy memorandum to Heads of all agencies stating that all such contracts are subject to the SCA. Knowing that DOL might take such action at any time (particularly after a significant Comp.Gen. decision of 1 June 1978 (B-190505; B. B. Saxon Co., Inc.) which upheld DOL's authority to apply SCA to overhaul and modification unless DOL's determination was clearly contrary to law), DOD referred the matter of equipment overhaul and modification to the Administrator (Mr. Les Fettig), OFPP. Although restricting equipment to engines, Mr. Fettig gave the DOD request favorable consideration and initiated action overruling DOL without first discussing the matter with the Secretary of Labor. This action met with the displeasure of the Secretary of Labor and with the Congressional Labor Subcommittees. Eventually, actions initiated by Mr. Fettig were

withdrawn upon receipt of a SecLabor letter of 10 October 1978 which informed SecDef that the matter was under active review to determine applicability of appropriate labor statute and that a one-year exemption from applying the SCA to engine overhaul and modification was granted. (A short time after this, Mr. Fettig departed his position. The question of final authority in SCA matters arose from this situation. It was referred to the Attorney General who later on in a 9 March 1979 opinion advised the President that final authority rests with SecLabor.) In mid 1979, DOD and DOL officials met and developed a draft definition/description of equipment overhaul and modification work which might be subject to the Public Contracts Act. Since that time, the draft definition/description has been undergoing review at high levels within DOL. When such review will be completed is not known. SecLabor has extended the engine exemption for an indefinite period. Meantime, DOD continues to apply the Public Contracts Act to equipment overhaul and modification contracts. Should overhaul and modification contracts finally be determined by DOL to be applicable to the SCA, at least two important Navy contractors have stated they will not accept SCA provisions. These contractors are Litton and Varian. [22:5-6]

b. SCA Applicability to Research and Development (R & D) Contracts

Dr. Perry, USD R & E, wrote SecLabor Marshall on 2 April 1980 expressing concern that DOL's proposed revisions to SCA regulations at 29 CFR Part 4 (published in the Federal Register of 28 December 1978) for the first time explicitly apply SCA provisions to R & D contracts (DOL adds R & D to a listing of services to which the SCA is applicable). Further, Labor's extension of SCA protections to more highly skilled

workers in the R & D field such as laboratory technicians who are quite adequately compensated is questioned. The letter states that application of the SCA in the past to R & D contracts has been a rarity. Finally, Dr. Perry points out that the application of the SCA to R & D contracts is not consistent with the SCA in that the SCA "clearly states that it is to be applied to contracts where 'the principal purpose ... is to furnish services ... through the use of service employees'". Summarizing, the USD R & D does not believe the SCA applicable to R & D contracts and suggests that if DOL intends to apply the SCA to R & D it should seek "specific new legislation from the Congress". To date, there is no indication of a SecLabor response to this letter. It is perhaps better that there has been no response when giving consideration to the Amendments of October 1976 and the authority of SECLABOR/DOL in making determinations of applicability would indicate the greater likelihood that DOD should be (i) applying the SCA and (ii) seeking specific new legislation from the Congress to remove R & D from SCA coverage and limit the administrative and enforcement authority of DOL. [22:6]

c. Applicability of SCA to ADPE Maintenance

In mid 1979, DOL discovered that GSA schedule contracts for purchase/lease/maintenance of ADPE did not contain SCA provisions applicable to the maintenance portion (considered a separate bid specification; also, customers were placing maintenance only orders under these schedule contracts). Labor directed GSA to apply the SCA. The incorporation of the SCA in solicitations for FY 80 schedules met resistance from several manufacturers/servicers by their refusal to accept SCA provisions (the industry pays its technicians based on a relatively

low minimum rate supplemented by merit/incentive pay; the DOL wage determinations set forth minimum rates substantially higher) (also, the industry would be reluctant to open up its payroll and other records to DOL as such records if disclosed to the public could erode a company's competitive posture). GSA's FY 80 problems were alleviated when DOL permitted award of schedule contracts without SCA provisions through 7 November 1979. Throughout this period, DOL and industry officials attempted to resolve the problem. An interim nationwide wage determination issued by DOL in November 1979 reduced the number of major companies refusing to accept SCA provisions to two (2) (Hewlett Packard and Digital Equipment Corp.). When confronted with direct contracting (sole source) with these companies, the DUSD R & E (AP) approved procedure of using purchase orders of \$2,500 or less was implemented. In June 1980, following continued attempts to resolve the matter, DOL issued a revision to its wage determination of 30 November 1979. Hewlett Packard in a July 1980 open letter has stated it will accept the revised determination which will be applicable for the life of the contract to which it is incorporated. Other heretofore unwilling companies are expected to follow suit. It appears, for the time being at least (FY 81 procurement), that the problem will dissipate without further pursuing the matter. [22:5]

B. WAGE DETERMINATION COMPLIANCE

During the course of this research, it became evident that the entire area of wage determinations has become a major implementation problem. A recent GAO report reviewed 14 DOD procurement offices

and revealed that most offices were not fully complying with SCA and ASPR (now DAR) requirements on obtaining wage determinations. [70] This report cited the following as examples:

1. Five procurement offices failed to request the required wage determinations from Labor for 27 of 425 contracts, and for another 27 contracts, five offices obtained wage determinations but did not initially include them in the contracts.

2. Six offices failed to request the required wage determinations for 62 of 212 purchase orders, and for another 12 orders, the office requested wage determinations but did not receive a reply.

3. The procurement offices failed to request determinations from Labor at least 30 days before solicitation, as required, for 205 (about 50 percent) of the 425 contracts reviewed and for 36 (about 17 percent) of the 212 purchase orders reviewed.

4. For 222 of 241 requests for wage determinations submitted late, the offices failed to give labor explanations for the untimely submissions.

5. Three procurement offices failed to give labor the required notices of award of contract in 76 of 131 contracts and purchase orders reviewed at these offices.

The GAO report further stated that an investigation conducted by DOL at their request showed that one procurement office's failure to include wage determinations in the contracts resulted in nine service employees of two contractors receiving lower wages and fringe benefits than they would have been entitled to under SCA. [70:6] It is the belief of this author that this condition is common throughout DOD and all other Agencies.

GAO's review showed that personnel at most procurement offices were often not aware of the DAR and Labor requirements for requesting wage determinations under SCA, that DOD provided procurement personnel only minimal training specifically on SCA, and that DOD did little internal monitoring of the procurement office's compliance with the DAR and Labor requirements for SCA.

DOD procurement office officials attributed the failure to request wage determinations for all contracts and other violations of DAR primarily due to procurement personnel carelessness, oversight, and unfamiliarity with the regulations. According to the officials, the primary reason for failing to request wage determinations for the 74 purchase orders was a lack of knowledge by procurement personnel that orders in the \$2,500 to \$10,000 range were subject to the Act. [70:12] The issuance by the Department of Defense of DAC 76-20 on 17 Sep 1979 has been of great help to the purchasing activities in educating the personnel on the requirements of the SCA and procedures for its implementation. There is still a long way to go in the education and compliance problems but the procedural problems associated with wage determinations are starting to disappear since DAC 76-20 has been incorporated by the purchasing activities.

C. WAGE DETERMINATION RATES

Once the mainly procedural problems with wage determinations are ironed out, the next issue to consider is whether the wage rates determined by DOL are fair and representative of the industry. DOL develops wage determinations based on predecessor labor agreements

SCA successorship doctrine), collective bargaining agreements, Federal rates, BLS surveys, and other means unknown to this writer. [22:4] The validity of these wages has been under some criticisms. This criticism has been directed mainly on the prevailing rate concept and successorship doctrine. The following is a summary of these two volatile areas:

1. Prevailing Rate Determinations

It has been the Department of Labor's policy to use wage rates prevailing at the location of the procurement activity as the "prevailing" rates for the place of contract performance when the place of performance is unknown at the time of bid. Under this policy, the "prevailing" rates could be way out of line with the actual area of performance resulting in a disruption of the economic structure of the area.

Industry states that many times DOL uses "median" or "mean" rates as prevailing rates. This practice can result in the wage determination specifying a rate which is actually paid to only one or none of the employees surveyed. Further, this practice eliminates all rates below the median or mean requiring the least experienced employees either to be paid the median or mean rate or to be laid off. In addition, it sets the stage for demands by the more experienced employees for higher wage rates in order to re-establish their former relationship to the less experienced employees. Industry questions whether a two-tiered wage system-commercial work versus Government contracts is required? They say that this would affect morale and hamper reassignments. It is felt that if the Federal wage is used for all work, they may price themselves out of commercial work, unjustly reward the marginal worker and

fail to recognize the superior worker with an adequate wage differential.

[38: 243-244]

2. Predecessor/Successor Contracts

The 1972 modifications to the Act prohibit a successor contractor from paying service employees less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms-length negotiations to which such employees would have been entitled if they were employed under the predecessor contract. (Sec. 4(c), 41U.S.C. G353(c)). However, if administered in accordance with its terms, it would require rates negotiated at the predecessor contract location to be applied as minimums at a different successor contract location even if the prevailing wage rates in the locality of the successor contractor are considerably lower.

The Act, as amended, makes it almost impossible for the Government to reap the benefits of legitimate competition. In addition, the amendment provisions discriminate against non-organized employees. Under those provisions, organized employees covered by a collective bargaining agreement are guaranteed that their wage rates will not be reduced by a successor contractor. Employees who are not covered by a collective bargaining agreement have no such guarantee. [38:246]

Another problem that has been evolving recently is the quantification of retirement benefits. Should a successor contractor be required to provide retirement benefits equal to the predecessor contractor's if his are of a lesser quality? This question has not been resolved to date.

Both the prevailing rate concept and successorship doctrine are considered inflationary by many people although a portion of these determinations must be considered acceptable as they comply with the intent of the SCA (to assure fair and living wages and fringe benefits for service employees). Such determinations can necessitate dual bookkeeping and developing special arrangements acceptable to the union if a labor agreements is involved. DOD labor advisors have received some general statements of displeasure from industry, but there has been little real evidence presented as to adverse impact on morale or job reassignments. There had been evidence though, of contractors refusing to bid on a contract because of the above problems associated with wage determinations. If other companies follow this lead, it could lead to a major disaster and a confrontation between DOL and industry.

D. INCLUSION OF COORDINATED FEDERAL WAGE SYSTEM RATES

Another amendment to the Act made in 1972 requires service contracts to include a statement of the rates that would be payable by Federal agencies to the various classes of service employees employed in the work if they were Federal employees covered by the Coordinated Federal Wage System. The shortcomings of this requirement were ably described in testimony before the Special Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives as follows: [38:247]

The services called for by most service contracts can be performed by various combinations of different skill levels, and the approach that would be used by the Government is seldom the same one that would be employed by a contractor bidding in a competitive procurement. Consequently, any attempt by a Federal agency to predict the number, grade level, and wage of the service employees required to perform a

specific task is at best a semi-educated guess that may be completely unrelated to the manning proposed by the successful contractor.

The vague and indefinite quality of the Federal employment rates that can be quoted renders them virtually useless as a guide for establishing the "prevailing rate in the locality". Another serious problem, however, is the inclusion of these rates in the actual contract, which could be incorporated as an implied requirement for the Contractor to compensate his personnel at the listed rates. Such ambiguity could lead to extended litigation and protracted controversy to the disadvantage of all parties concerned. We strongly feel that contractual documents should be kept as clear as possible of such distracting and confusing information. (Testimony of J.A. Caffiaux, Vice President of the Government Products Division of the Electronic Industries Association, before the Special Subcommittee on Labor, Committee on Education and Labor, U. S. House of Representatives (May 8, 1974))

E. LABOR ENFORCEMENT OF SCA

The Department of Labor's ten regional and Employment Standards Administration's (ESA) Wage and Hour Division's 88 area offices are responsible for enforcing labor standards provisions in contracts subject to the SCA. The regional and area offices are to prepare program plans for enforcing SCA and other Acts. Under this plan, the area offices are to investigate for compliance with SCA provisions for a variety of reasons including:

1. complaints;
2. other information indicating noncompliance;
3. improper practices needing correction found in a particular industry; and
4. a general direct enforcement program to investigate as many covered employees as possible with available staff.

Regarding a general direct enforcement program, ESA's Field Operations Handbook states:

"Our goals and objectives, simply stated are to provide service to the public and to vigorously and uniformly enforce all Acts for which we have responsibility. We must be receptive to and promptly service all legitimate complaints. Additionally, we must recognize that under some Acts substantial violations are occurring but, for a number of reasons, a smaller number of complaints are made. Similarly, we must recognize that the servicing of complaints without a direct program does not give us the balanced compliance program which has been mandated to use in the allocation of resources. Thus in executing a compliance program, we must strive to insure that all Acts are enforced, notwithstanding that complaints may or may not be received."

Thus, ESA has recognized that a program of directed review is needed to insure compliance with SCA.

In a review by GAO, three regional offices and seven area offices were visited to determine the extent of ESA's enforcement of the SCA.

This review revealed the following:

1. The area offices devote only a small part of their staff resources to enforcing SCA,
2. The area offices' enforcement efforts are limited primarily to investigating complaints,
3. The area or regional offices made few self-initiated compliance reviews of SCA contractors, and
4. None of the area or regional offices have a program for monitoring compliance with SCA provisions. [70:19]

The GAO report pointed out as an example, the SCA requires a contractor to notify employees of compensation due them under SCA and to provide sanitary and safe working conditions. Yet, according to several area office officials, no effort is made to determine if these requirements are complied with unless a specific complaint is received. They added that Labor's Occupational Safety and Health Administration would be responsible for investigating complaints about unsafe working

conditions. The SCA enforcement actions are combined with actions concerning other Government contract laws, such as the Davis-Bacon, Walsh-Healey, and Contract Work Hours and Safety Standards Acts. GAO's investigations revealed that approximately 4% of the available staff-years is utilized in enforcing Government contract laws. [70:20]

The seven area offices reviewed received an average of 110 complaints relating to SCA. Regional and area office officials said that they had too few compliance officers to investigate SCA complaints and to make self-initiated compliance reviews of contractors or to monitor DOD's and other agencies' compliance with SCA. As a consequence, their offices have been forced to maximize their efforts and that amounted to investigating complaints only. [70:20]

ESA headquarters officials acknowledged that ESA does not conduct a directed program of reviewing randomly selected SCA contracts or contractors. They also acknowledged that ESA (1) has no way of determining the extent of noncompliance with SCA regulations by DOD and other Federal agencies and (2) does not know whether contractors are violating the Act by paying service employees lower wages than are required. The officials claim they cannot make these program reviews because they have too few compliance officers to handle the complaint workload. [70:21]

What does all of this mean: It means that SCA contractors who are in violation will continue to operate in noncompliance with the Act. DOD and other Federal agencies will establish procedures and continue to contract without knowing whether they are interpreting the law correctly or not. Many service employees will not receive the benefits provided them by the Act. In many ways, it is as though there were no Act at all!

F. REVIEW OF DEPARTMENT OF LABOR DETERMINATIONS

The SCA does not provide for review, either by the Comptroller General, Office of Federal Procurement Policy, or the courts, on wage rate determinations or determinations as to applicability of the Act made by the Department of Labor.

Some prior decisions have held that the Secretary of Labor rather than the contracting agency has the responsibility for determining which statute is applicable to a particular contract. (Curtiss-Wright Corp. vs McLucas). In 1974, however, Congress created OFPP for the purpose of providing "overall direction of procurement policy" OFPP claimed that the interpretation of labor standards statutes to determine which applies to a particular class of contracts is a procurement policy matter which P.L. 93-400 authorizes it (rather than the Labor Secretary) to decide. OFPP claimed the duty and the power to identify, to consult with DOL about, and, if it must, to override incorrect or inappropriate interpretations or applications of the SCA that are gratuitously and severely costly to the government. [25]

The U.S. Attorney General disagreed. The legislative history of P.L. 93-400 (particularly the activities of the Commission on Government Procurement) indicates an intent to distinguish between (a) the "procurement aspects" of the contract labor standards statutes, and (b) the "substantive enforcement" of those statutes. OFPP was given authority to set policy over the procurement aspects in the interest of achieving uniformity. However, the quite separate responsibility of interpreting and enforcing the "socio-economic purposes" of these statutes was not conferred on OFPP. Instead, Congress intended to avoid interfering

with the existing agency authority to make policy in these substantive areas until the socio-economic statutes could be subjected to later Congressional review and possible modification.

Accordingly, the Attorney General concluded that the Secretary of Labor rather than OFPP is responsible for deciding whether a particular class of contracts is subject to the SCA. [41]

These rulings have placed an enormous amount of power into the hands of the Secretary of Labor. It is this very aspect that creates a deep concern among defense contractors and the Department of Defense. They wonder whether DOL will treat each conflicting situation objectively or will DOL favor labor in a dispute. In the past, the instant dispute touched upon procurement as well as labor, it has been resolved by the Labor Department with focus exclusively on labor concerns. [26]

Early in 1979, the National Council of Technical Service Industries (NCTSI) executive director, Edward C. Leeson, had written President Carter urging him to formally support repeal of the SCA. Mr. Leeson's primary reason for this request is because of Labor's enormous amount of power as characterized by this statement: "It is our view that the Labor Department sees itself as a champion of organized labor at whatever cost. It has not to date demonstrated objectivity in its interpretations. It is our earnest belief that DOL is reversing the intent of Congress in administering the Service Contract Act. Rather than establishing minimum rates based upon prevailing wages in the locality, DOL is obviously specifying the payment of excessively high wages." [9]

Without a higher authority to review DOL's decisions, it is felt by many that DOL will continue to expand coverage of the SCA and specify the payment of excessively high wages.

V. AN IMPLEMENTATION GUIDE

A. BACKGROUND

The bulk of this chapter is this author's model of a guide to the implementation of the Service Contract Act. The primary purpose of this guide is to provide under one cover, enough information to educate a person dealing in contracting, with the requirements of the SCA. This chapter may be utilized as a teaching guide during training sessions or incorporated into an agency's procedures manual for use in dealing with the SCA. The usefulness of this guide was further enhanced by the participation of numerous people knowledgeable on the problems generated by the SCA. The guide was developed in draft form and then sent out for comment. The following is a list of people and commands that participated in its development.:

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B. RESULTS

It is anticipated that the use of this guide will greatly increase the awareness among contracting personnel of the requirements of the SCA. The many problems associated with its applicability, coverage, and agency compliance should be greatly reduced through the use and understanding of this guide. The names, addresses, and telephone numbers of knowledgeable personnel are presented to further enhance communications and aid in unifying the Navy's implementation of the SCA.

A PRACTICAL GUIDE TO THE IMPLEMENTATION
OF THE SERVICES CONTRACT ACT OF 1965
AS AMENDED

By
RODNEY F. MATSUSHIMA
LCDR, SC, USN

DEDICATION

I would like to dedicate this guide to Mr. Richard H. Hedges, Labor Relations Advisor, Headquarters, Naval Material Command, without whose unselfish help this guide could not be possible.

NUMBERING SYSTEM FOR THE GUIDE

In an effort to maintain the integrity of the guide, a separate numbering system will be utilized. The Guide's page numbers will appear in the bottom right portion of the page and will be preceded by the letter "G" for guide. The Guide also utilizes its own references which will be identified by the letters of the alphabet.

PREFACE

Although the Service Contract Act of 1965 has been in existence for 15 years, there remains the fundamental need for an easy to understand guide to its peculiarities and implementation requirements. This guide is an attempt to do just that. But, it is much more than that. It is a part of a Master's thesis analyzing the problems and issues that have arisen during the Act's 15 turbulent years of existence. This guide is a result of the thesis research and is the author's model to provide a possible means of solving some of the problems. The guide would present a means for better educating the applicable contracting personnel and provide an excellent sample for a much needed procedures manual on the requirements of the SCA.

Anyone interested in obtaining the entire thesis will find it available through the Defense Logistics Studies Information Exchange, United States Army Logistics Management Center, Fort Lee, Virginia, 23801. The thesis provides more insight into the problems and issues raised by the enactment of the SCA and possible recommendations on improving the Act.

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G-I. INTRODUCTION

This guide is an attempt to provide the reader with a thorough knowledge of the McNamara O'Hara Service Contract Act (SCA) of 1965 as amended. Chapter II contains a suggested step by step guide to be followed in implementing the SCA. Chapters III through XIII provide the reader with an in-depth discussion on all aspects of the SCA.

All regulations and instructions contained in this guide conform to the Defense Acquisition Regulations (DAR), Title 29, Code of Federal Regulations, Parts 4, 6, and 1910, and other instructions issued by the Secretary of Labor.

G-II. IMPLEMENTATION BY CONTRACTING AGENCIES

A. INTRODUCTION

The following pages contain a suggested step by step method to be used in the implementation of the Services Contract Act. It is an attempt to simplify the procurement process by segregating into steps each significant portion of the process. The steps generally follow the procedures set forth in DAR Chapter 12 with amplifying discussions and suggestions provided by the author.

Exhibit B-1 is a graphical representation of the entire procurement process.

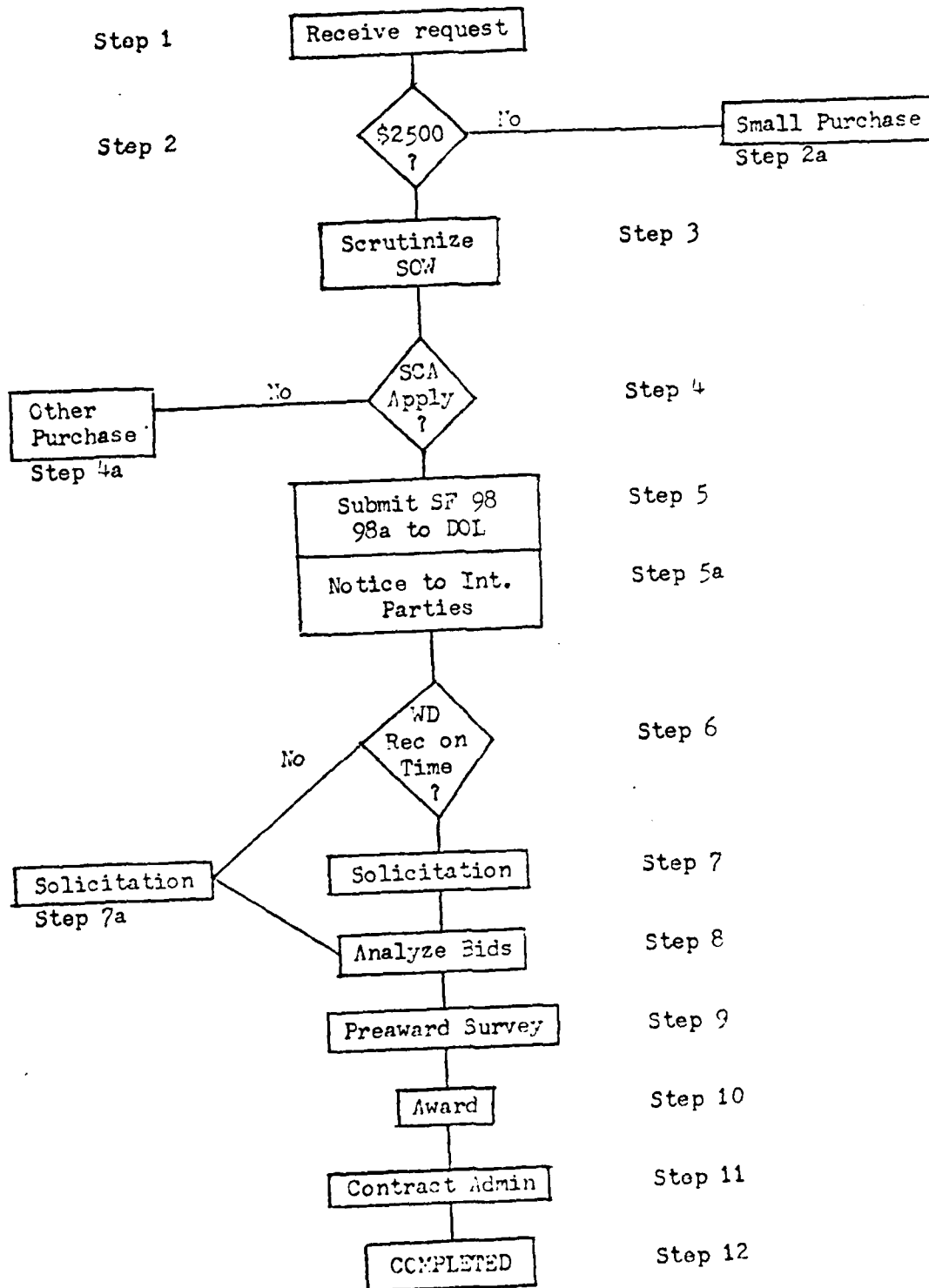


EXHIBIT G-1

Step 1 - Receipt of Request from Functional Area

1. This phase initiates the procurement process.
2. Requests can be received on 1250's, 1348's, 1149's, 1155's depending on command policy.
3. Request should contain at the least:
 - a. Complete Statement of Work (SOW)
 - b. Services Questionnaire (Exhibit G-9, Chapter VI)
 - c. Authorized signatory

Step 2 - Decision Point (greater than \$2,500?)

1. This phase is the first decision point when dealing with the SCA.
2. The SCA contains a threshold figure of \$2,500.
 - a. If the request is for \$2,500 or less, go to step 2a which is for small purchases.
 - b. If the request is for more than \$2,500, continue to step 3.

Step 2a - Less than \$2,500?

1. For solicitations and contracts that are or may be \$2,500 or less, to which the Act applies, the contracting officer shall include the clause set forth in DAR 7-1903.41(b). The clause reads as follows:

SERVICE CONTRACT ACT OF 1965, AS AMENDED (1979 SEP)

Except to the extent that an exemption, variation, or tolerance would apply, pursuant to 29 CFR 4.6, if this were a contract in excess of \$2,500, the Contractor and any subcontractor hereunder shall pay all employees engaged in performing work on the contract no less than the minimum wage specified under Section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. All regulations and interpretations of the Service Contract Act of 1965, as amended, expressed in 29 CFR Part 4, are hereby incorporated by reference in this contract.

EXHIBIT G-2

Step 3 - Scrutinize Statement of Work (SOW)

The Statement of Work is the most important item in the purchasing request. It is primarily from this that the decision will be made whether the SCA applies or not. The SOW is also the basis by which a contractor will formulate his bid. It is because of its importance that a discussion on the SOW is included.

1. Development of a Statement of Work. The Work Scope, Statement of Work, Technical Requirement, or Specification are all terms used to state Government requirements. Generally the Statement of Work is divided into four major component groups: the essential requirements; the method of adequately expressing the quality assurance and test requirements; the technical data; and the management data to be delivered under the contract. Industry has alleged that work statements have become so complex that the contractor cannot fully comprehend all the requirements the Government desires. However, if the Statement of Work is sufficiently definitive, some contractors may not submit offers because of uncertainty of the tasks involved, or conversely, feel inhibited by the purchaser because the work statement is too restrictive. The detailed requirements set forth for the services must place all potential contractors on a competitive basis. Its completeness and presentation provide procurement personnel with a control and represents its potential worth.

Failure to adequately describe the scope of the work will result in needless delays and extra administrative effort during the source selection process. Lack of clarity and definition in the Statement of Work may

cause valuable time to be lost in obtaining additional information.

Additionally, contractors could be disqualified from the selection process due to inadequate technical competence. Costly contingency allowances or low quality and inventive proposals may also be the unintentional results. [C:42]

The development of the Statement of Work must be a team effort with personnel from the functional area, the procurement office, and manpower and/or management engineering. The functional area chief, the team leader, must exercise authority and responsibility for the service that will be under contract. Functional people state the service to be delivered, measure the quality of the service, and accept the service. Assisting them is the procurement office which prepares the contract, enforces its provisions, and provides necessary authority and technical experience in contracting to make the contract a workable document. The manpower and/or management engineering perform cost studies.

The traditional method for defining requirements is to write a process-oriented Statement of Work. In essence, the Government translated existing methods or processes into a Statement of Work and the contractors were asked to provide a service based on this statement. The problem for the Government is to define and measure the quality of the contractor's effort. Another approach, suggested by the Air Force, is to design the Statement of Work on a systematic analysis of the function to be performed. This procedure, called job analysis, involves a step-by-step review of the requirements to arrive at a specific output or services with associated standards of performance. The contractor would integrate a system of people, facilities, material,

and the Government Statement of Work, and then input these into a work process with the results being contract performance. [C:44]

2. Job Analysis. Job analysis includes a thorough analysis of each job's inputs, process, and output functions (Exhibit 3). The steps in job analysis are organization, tree diagram activity analysis, data gathering, performance values, governing directives, and deduct analysis. In the job analysis phase the services or outputs will become the basis for writing a Statement of Work, developing standards, defining performance indicators, and identifying acceptable quality levels of performance. The service or services required are linked together in a tree diagram breaking the services into parts or subparts. Work analysis needs to be performed to take each part of the tree diagram and break it into input, work, and output. After the services that will be provided under the contract are identified, then the workload and resource data are gathered. This data provides the frequency by which the output services are provided during the proposed contract period. This workload data can be given to the bidders to increase their understanding of the true requirements and for later construction of a surveillance plan. The required resource data will include the physical assets and personnel needed to perform the contract. Finally, performance values must be determined so that each service provided by the contractor has an acceptable quality level. Performance values can be obtained from historical records, managerial desires, or imposed quality levels. Associated with each output will be a performance indicator in order that the output can be measured. If indicators are not prescribed, the analyst must decide along with the customer or management

what indicators would aid in measuring the process. Rates in terms of time, distance, and cost are quite helpful. In any case, try to have the performance indicator quantifiable. Standards to which the performance indicators are measured must be familiar, i.e., published requirements, manuals, technical orders, or regulations.

Any regulatory guidance pertaining to the service must be investigated. Most guidance is usually rather general at upper echelons, and becomes detailed as it descends the chains of command. A manager usually has numerous options as to the direction he proceeds. The underlying principle is to be able to understand the guidance.

Exhibit 3 illustrates the job analysis process.

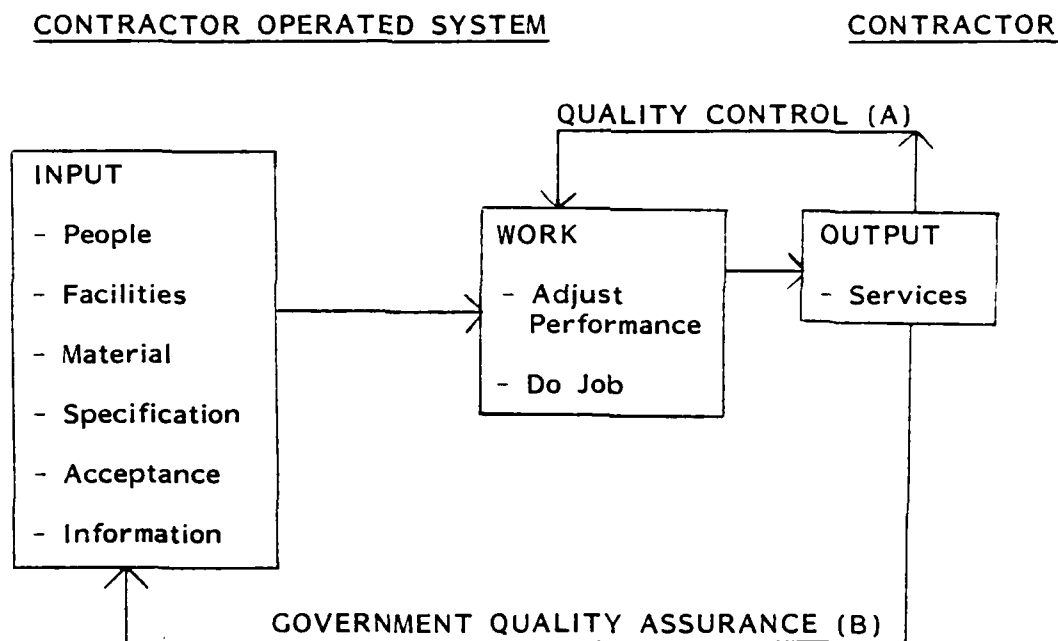


EXHIBIT G-3

The quality control loops (A) feed back information from the output into the work process. The specified standards require the contractor to adjust performance if needed. The Government quality assurance loop (B) determines the acceptability.

3. Writing the Statement of Work. Upon the conclusion of the job analysis, the Statement of Work is written stating the requirements, and the quality assurance surveillance plan which complements the Statement of Work. An overview of contract analysis steps are as follows:

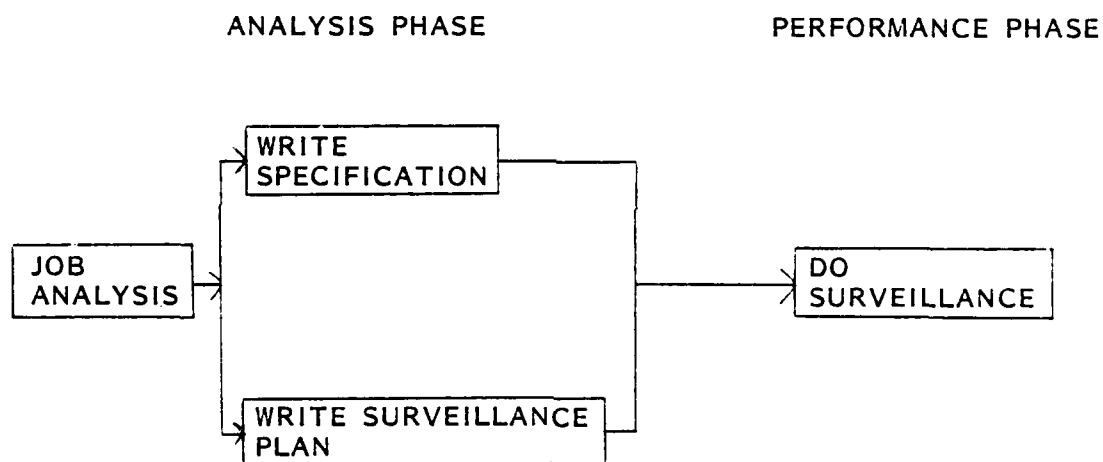


EXHIBIT G-4

When writing the requirements part of the Statement of Work, it becomes necessary to identify the subject matter of the procurement in great detail. The Statement of Work must include description, materials, dimensions, number of items serviced, overall workmanship of items serviced, and provisions for repair and maintenance over certain contractual periods of time. A proper balance between cost and value of

quality must be specified. A large share of the requirements portion of the Statement of Work depends upon engineering and technical experience. Since the Government is responsible for writing the contract, the words written into the Statement of Work must be able to be interpreted by their exact meanings. If it is necessary to use words in an abstract way, examples, illustrations, or definitions should be included to further amplify what is desired. "Shall", "will", "any", "either", "and/or", and misusing pronouns is to be avoided. Terminology must be consistent with abbreviations and acronyms held to a minimum or fully explained. A successfully written Statement of Work reads well, is logical, and can effectively communicate its intentions to the reader.

Ambiguous terms include the following: [C:48]

1. good workmanship
2. or equal
3. in accordance with the best commercial practice
4. good materials
5. as determined by the contracting officer
6. skillfully fitted
7. high quality
8. practically free
9. reasonable
10. free from impurities

Step 4 - Decision Point (does SCA apply?)

1. This is the most critical and perhaps controversial area.

Review Chapter IV in this guide and make an applicability determination to the best of your ability.

2. The following is a check list of questions to ask yourself in determining whether the SCA is applicable:

- a. What is the principal purpose of this contract?
- b. Is this contract for Expert and Consultant Services?
- c. Is this contract for Contractor Support Services?
- d. Is this contract for Commercial or Industrial Activities

Support Services?

- e. Was the Personal services versus nonpersonal services form filed?
- f. Could dual coverage be involved?

3. If it is determined that the SCA applies, move on to step 5.

Step 5 - Submit SF98 and SF98a to DOL

1. The Standard Forms 98 (Exhibit G-5) and 98a (Exhibit G-6) are required to be submitted no less than 30 days prior to:

- a. issuance of any solicitation or commencement of negotiations for any new contract,

- b. contract extension,

- c. bilateral modification adding significant new work,

- d. exercise of an option exceeding \$2,500,

which may be subject to the Act. The SF 98 is the operative document upon which, when fully complete and responsive, DOL relies in rendering its wage determinations for service contracts.

2. The contracting office shall file the forms with the:

Administrator
Wage and Hour Division
U.S. Department of Labor
Washington, D.C. 20210

3. To avoid delays because of late issuance of wage determinations by the Department of Labor in response to the notice, every effort must be made to file early.

4. Instructions for filling out the SF 98 are printed on the back of the form. They are easy to read and straight forward.

5. The contracting office must file the SF 98a with the SF 98. The SF 98a should contain the following information concerning the service employees expected to be employed by the contractor and any subcontractors in performing the contract:

- a. classes of service employees;

- b. the number of service employees in each class; and
- c. the wage rate that would be paid each class if employed by the agency and subject to the wage provisions of 5 U.S.C. 5341 or 5332.

6. Successorship Doctrine. Section 4(c) of the SCA imposes an added requirement to the filing of the SF 98/98a under the following circumstance.

If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor whose contract the proposed contract will succeed, and if the incumbent contractor is furnishing such services through the use of service employees whose wages and fringe benefits are the subject of one or more collective bargaining agreements, the contracting officer shall obtain from the contractor a copy of each such collective bargaining agreement, together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement, and submit them with the SF 98/98a, retaining a copy for the contract file. If such services are being furnished for more than one location and the collectively bargained wage rates and fringe benefits are different for different locations or do not apply to all locations, the contracting officer shall identify the locations to which the agreements have application.

DISCUSSION. Identifying the relevant locality is simple when the contract is to be performed, on-site, at a Government facility. However, where the contract is to be performed at contractor's facility, it is often

very difficult to determine what the appropriate "locality" ought to be. Until a recent court decision, the practice of the Department of Labor was to issue a wage determination which could cover the entire nation. After a U.S. District Court expressed its disapproval of that practice, Department of Labor now generally attempt to issue a wage determination which covers a locality that is a composite of the areas in which the various prospective contractors are located.

7. Care should be taken to ensure that all required information is provided to avert return of the SF 98/98a without action by the Department of Labor.

8. If exceptional circumstances prevent the filing of the notice of intention and the supplemental information, the notice shall be submitted to the Wage and Hour Division as soon as practicable, with a detailed explanation justifying the need for expeditious action on the SF 98/98a.

9. Requests to expedite issuance of wage determinations or to check the status of a particular request should be made through the Labor Relations Advisor. Direct contact with DOL officials for this purpose is not authorized by the DAR.

10. Wage Determinations. Sections 2(a)(1) and (a)(2) of the SCA obligate the agencies to include in every contract covered by the SCA the wage rates and fringe benefits specified by DOL in its wage determinations. If the contracting officer has timely filed his SF 98/98a, DOL will ordinarily respond with a wage determination in time for its inclusion in the solicitation, and then into the contract when awarded.

DOL develops wage determinations based on:

- a. predecessor labor agreements (SCA successorship doctrine)
- b. collective bargaining agreements (CBA)
- c. Federal rates
- d. BLS surveys
- e. other data

DISCUSSION. Often these determinations will be higher than the average rates paid in the area. However, although inflationary, a portion of these determinations must be considered acceptable as they comply with the intent of the SCA (to assure fair and living wages and fringe benefits for service employees). Such determinations can necessitate dual bookkeeping and developing special arrangements acceptable to the union if a labor agreement is involved. Although DOD labor advisors have received some general statements of displeasure from industry, there has been little real evidence presented as to adverse impact on morale or job reassignments. It is recognized that on occasion a wage determination can cause excessive compensation for the marginal worker and inadequate pay for the superior worker (this rarely occurs because a prospective contractor confronted with such a situation would be unlikely to tender a bid or offer).

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS
ADMINISTRATIONNOTICE OF INTENTION TO MAKE
A SERVICE CONTRACT AND RESPONSE TO NOTICE*See Instructions on Reverse*

1. NOTICE NO.

A 102140

MAIL TO:

Administrator
Wage and Hour Division
U.S. Department of Labor
Washington, D.C. 20210

2. Estimated solicitation date (month, day, year)

Month _____ Day _____ Year _____

3. Estimated date bids or proposals to be opened or negotiations begun (month, day, year)

Month _____ Day _____ Year _____

4. Date contract performance to begin (use numerical)

Month _____ Day _____ Year _____

5. PLACE(S) OF PERFORMANCE

6. SERVICES TO BE PERFORMED (describe)

7. INFORMATION ABOUT PERFORMANCE

A. ☐ Services now performed by a contractorB. ☐ Services now performed by Federal employeesC. ☐ Services not previously performed

8. IF BOX A IN ITEM 7 IS MARKED, COMPLETE ITEM 8 AS APPLICABLE

a. Name and address of incumbent contractor

b. Number(s) of any wage determination or attachment's contract

c. Name(s) of union(s) if services are being performed under collective bargaining agreements. *Important: Attach copies of current applicable collective bargaining agreements*

RESPONSE TO NOTICE

(by Department of Labor)

A. ☐ The attached wage determination(s) listed below apply to performanceB. ☐ As of this date, no wage determination applicable to the solicited activity and classes of employees is in effectC. ☐ From information supplied the Service Contract Act does not apply. *See attached explanation.*D. ☐ Notice returned for insufficient information. *See attached explanation.*

9. OFFICIAL SUBMITTING NOTICE

SIGNED:

DATE

TYPE OR PRINT NAME

TELEPHONE NO.

10. TYPE OR PRINT NAME AND TITLE OF PERSON TO WHOM RESPONSE IS TO BE SENT AND NAME AND ADDRESS OF DEPARTMENT OR AGENCY, BUREAU, DIVISION, ETC.

GENERAL EXPLANATION

The amended Service Contract Act requires the Secretary of Labor to issue wage determinations applicable to employees engaged in the performance of service contracts in excess of \$1,500. Standard Form 98, Notice of Intention to Make a Service Contract, with Attachment A, provides an orderly procedure for a contracting agency to request such a wage determination and for the Department of Labor to respond. Any questions as to whether a notice is required in a particular procurement situation should be resolved by reference to Title 29, Part 4, Code of Federal Regulations, or by submission of the question to the Department of Labor.

Under normal circumstances the Department of Labor will respond to a notice within 30 days of receipt. If there is urgent need for more expeditious handling, this should be explained when the notice is submitted. In the event the necessary response is not received by the contracting agency on a timely basis, the Department of Labor should be contacted.

In any case where section 4(c) of the Act requires adherence to compensation provisions of a collective bargaining agreement applicable under a predecessor contract and the agency desires to request a hearing on the issue of substantial variance between the wages and fringe benefits provided under such agreement and those prevailing in the locality, the request should be submitted with the notice of intent, in accordance with the provisions of 29 CFR 4.10, and sufficiently far in advance of the need for the wage determination to allow time for appropriate action as provided in that section of the regulations.

The notice is divided along functional lines: (1) that part which must be completed by the contracting agency, Items 2 through 10 of the basic form and Items 11 through 14 of the attachment; and (2) the Response to Notice to be completed by the Department of Labor. The basic form and its attachment are provided in quadruplicate sets with carbon inserts. The original and two copies of the basic form and of each set of attachments used (with snap-out carbons removed and the forms fastened together) are to be sent to the address preprinted on the basic form. One copy of the basic form and one copy of the attachment are to be retained by the agency.

INSTRUCTIONS—AGENCY PORTION OF NOTICE

Entries on Basic Form

Item 1—This number is preprinted on the basic form for identification and control purposes. Refer to this number when contacting the Department of Labor about the notice.

Item 2—Enter the estimated solicitation date.

Item 3—Enter the date the bids or proposals are expected to be opened or the negotiations started.

Item 4—Enter the date contract performance is expected to begin.

Item 5—The entry as to place of performance depends on a variety of factors. If the place of performance is fixed, as with a contract for janitorial services at a particular installation, enter the appropriate city, county and State. If performance is to be at several known places, attach a list. If the contract is for transportation services between points, enter the city, county and State of origin and of destination. If the place of performance may be anywhere, depending on who is awarded the contract (as, for example, certain laundry contracts), enter "unknown." If necessary for clarity, attach a brief explanation of the entry in Item 5.

Item 6—Describe the services to be performed in such a manner that it will be clear what type or types of services are called for by the contract. In many instances simple entries will suffice: "Janitorial services at Headquarters Building, Fort Sill," "Food service and kitchen police service at Enlisted Mess, Camp A. P. Hill," "Laundry and drycleaning services for Base Hospital, Eglin AFB," "Garbage collection at Ft. Hood." Unusual types of services must be described in more detail.

Item 7—Mark the appropriate box.

Item 8—It is very important under the amended Service Contract Act that appropriate entries be made in Item 8 if Box A of Item 7 has been marked.

a. Enter the name and address of the incumbent contractor.

b. Enter the number(s) of any wage determination(s) made part of the incumbent's contract. For example: 71-69 (Rev. 3) and 69-43 (Rev. 4).

c. Enter the name(s) of union(s) if any of the services are being performed by the incumbent contractor under collective bargaining agreement(s). If an entry is required in c., a copy of all current applicable collective bargaining agreements must be furnished with the notice. The notice will be returned without action by the Department of Labor if this is not done.

Item 9—It is often necessary for the Department of Labor to get in touch with the contracting official who submitted the notice in order to clarify particular points and expedite a response. The name of this official should be printed or typed in the space provided and he should sign his name above. The telephone number, including area code, should be entered. Enter the date the notice is submitted.

Item 10—Print or type this entry in the space provided within the brackets. This is used by the Department of Labor to identify the contracting agency and for mailing purposes.

ENTRIES ON ATTACHMENT A

Item 11—Enter the notice number found in Item 1 of the basic form.

Item 12—Enter the classes of service employees to be employed in performing the contract. A simple entry may suffice: "Janitor," "Window cleaner," "Automotive mechanic," "Guard," "Stenographer," "Typist," "Warehouseman," "File clerk." Where more complex jobs are involved, it will expedite handling to use a few lines below the entry for a class to describe briefly what the employee will do—a sort of capsule job description. The entries in Item 12 are crucial as they enable the Department of Labor to "match" the job to be performed against existing wage determinations or available wage payment data.

Item 13—Enter the number of employees to be employed in each class listed in Item 12. Do not omit this figure even though it may be necessary to use a rough estimate.

Item 14—The amended Service Contract Act (section 2(a)(5)) requires the contracting agency to include in the contract, "A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 of Title 5, United States Code, were applicable to them." The Secretary of Labor is required to give "due consideration" to such rates in making wage and fringe benefit determinations.

For purposes of the entries in Item 14, assume that each class of employees listed in Item 12 is to be Federally employed, that is, to be employed directly as "wage board" or "blue collar" employees by the contracting agency and who, if so employed, would receive wages as provided in 5 United States Code 5341. Enter the hourly wage rate that each such listed class would be paid. The agency's personnel office may be of help in determining the appropriate hourly rate entries.

While the "statement" made part of the contract must include both the hourly wage rates and fringe benefits that would be paid to the various classes, it is not necessary to furnish fringe benefit information as part of the notice. In giving "due consideration" to the fringe benefits that would be paid, the Department of Labor will consult the formula previously made available to all contracting agencies for use in preparing the "statement" required to be made part of the contract.

INSTRUCTIONS—RESPONSE PORTION OF NOTICE

(Completed by Department of Labor)

The original copy of the basic form and the original copy of the attachment will be returned to the contracting agency with appropriate entries by the Department of Labor in that portion of the basic form reserved for Response to Notice.

A. If this box is marked, the wage determination(s) applicable will be listed by number and attached. The wage rates and fringe benefits reflected in the attached wage determination(s) are applicable to the procurement and must be made part of the contract. (If wage rates and fringe benefits are not provided in the wage determination(s) for particular classes of service employees to be employed on the contract, confirmation must be taken as provided in Title 29, Part 4, section 4.6(b)(2), Code of Federal Regulations.)

B. If this box is marked, no wage determination applicable to the specified locality and classes of employees is in effect. However, successor contractors may not pay less than the collectively bargained wage rates and fringe benefits, including any prospective increases, applicable to employees of the predecessor contractor except where, upon a hearing, it is found that such wage rates and fringe benefits are substantially at variance with those that prevail in the locality. In no case may an employee be paid less than the minimum wage under section 6(a)(1) of the Fair Labor Standards Act.

C. From time to time the Department of Labor receives a notice with respect to a proposed contract which, on the basis of the information supplied by the contracting agency, is not subject to the Service Contract Act. If box C is marked, an explanation will be attached.

D. This box will be marked if the notice must be returned for additional information. An explanation will be attached so that the contracting agency will know what action to take.

ADDITIONAL WAGE DATA

The Department of Labor welcomes any wage rate and fringe benefits data the contracting agency may submit in connection with a notice, as well as any explanatory information that will assist in understanding the proposed procurement.

Step 5a - Notice to Interested Parties

If the contracting officer is aware or has reason to believe that the incumbent contractor or subcontractor is negotiating or has consummated a collective bargaining agreement with a bargaining agent representing service employees performing on the contract, both the contractor and bargaining agent shall be notified of the pending acquisition at least 30 days prior to:

1. issuance of the solicitation, or
2. the commencement of performance of contract modification extending the initial period of performance or affecting the scope of effort or of an option.

The notification shall be made by registered letter, return receipt requested, and shall set forth all pertinent dates.

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IMPLEMENTATION OF THE SERVICE CONTRACT ACT OF 1965.(U)
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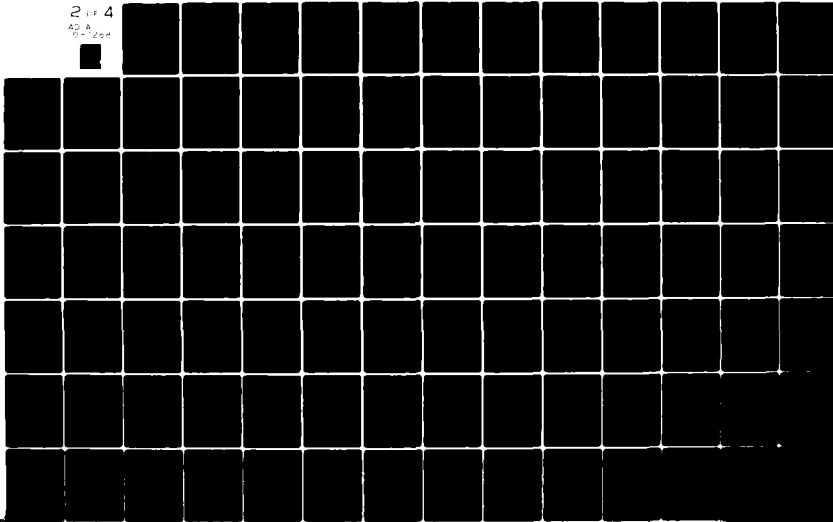
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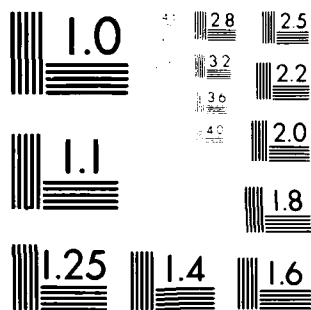
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Step 6 - Decision Point (wage determination received on time?)

1. If the SF 98 and SF 98a were filed in a timely manner, DOL will ordinarily respond with a wage determination in time for its inclusion in the solicitation. If that is the case, do the following:

a. Review the wage determination.

1.) If a contracting officer believes that an incumbent contractor's collective bargaining agreement was not entered into as a result of arms length negotiations which resulted in wages and fringe benefits at substantial variance with those prevailing for services of a character similar in locality, he should do the following:

a.) Review immediately the agreement to ascertain if a hearing is warranted.

b.) Submit a request for hearing, when warranted, to the departmental labor advisor through contracting channels.

Sufficient payroll data shall accompany this request to support a prima facie showing that the bargained-for rates, in fact, are substantially at variance with those prevailing for services of a character similar in the locality. Except under extraordinary circumstances, as determined by the Administrator, a request for hearing shall not be considered by the Secretary unless received by the Department of Labor more than ten days before the award of an advertised contract or prior to the commencement of a negotiated contract or contract extension, through option or otherwise.

2.) Immediately upon receipt of a wage determination not predicated upon a collective bargaining agreement, the contracting

officer shall examine the wage determination to ascertain whether it is correct and whether it conforms with the wages and fringe benefits prevailing for services of a character similar in the locality. If the wage determination is at substantial variance with the prevailing rates, the contracting officer shall submit a full statement of the facts to the departmental labor advisor through contracting channels for appropriate action.

b. If you determine that the wage determinations are fair, proceed to step 7.

2. If the SCA wage determination is not received in time for inclusion in the solicitation:

a. and there is no incumbent contractor union agreement, the contracting officer should proceed using the latest wage determination included in the existing contract, if any.

b. In those cases involving an incumbent contractor operating under a collective bargaining agreement, the wage determination in the incumbent's contract shall not be included in any solicitation that must be released without a new SCA wage determination. Instead, using the solicitation provisions at DAR 7-2003.85 (Exhibit G-7), offerors shall be informed that --

1.) the economic terms of such agreement(s) will apply to the contract and should be considered in developing an offer; however,

2.) pursuant to Department of Labor regulations at 29 CFR 4.1c, the economic terms of any agreement entered into subsequent to this solicitation might apply to the contract.

c. The contracting officer shall notify in writing the Administrator Wage and Hour Division, of each case when compelled to proceed without a new wage determination due to a delayed response from the Department of Labor. An information copy of each such notice shall be forwarded to the appropriate departmental labor advisor.

7-2003.85 SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA). In accordance with 12-1005.2(b)(5), insert the following provision in all solicitations for the acquisition of services to which --

- (i) the clause at 7-1903.41(a) applies;
- (ii) the contract resulting from this solicitation succeeds an ongoing contract for substantially the same services;
- (iii) the incumbent contractor has negotiated or is negotiating a CBA with some or all of its service employees; and
- (iv) all applicable Department of Labor wage determinations have been requested but not received.

**SERVICE CONTRACT ACT (SCA) MINIMUM WAGES AND FRINGE BENEFITS
(1979 SEP)**

An SCA wage determination applicable to this work has been requested from the U.S. Department of Labor. If an SCA wage determination is not incorporated herein, the bidders/offerors shall consider the economic terms of the collective bargaining agreement (CBA) between the incumbent contractor _____ and the _____ (union). Copies of the agreement can be obtained from the contracting officer. Pursuant to DOL Regulation, 29 CFR 4.1c, the economic terms of that agreement (or any new CBA negotiated ten or more days prior to the opening of bids, or the commencement of the contract in the case of negotiated contracts, exercise of options, or extensions) will apply to the contract resulting from this solicitation, notwithstanding the absence of a wage determination reflecting such terms, unless it is determined, after a hearing pursuant to Section 4(c) of the SCA, that they are substantially at variance with the wages prevailing in the area.

EXHIBIT G-7

Step 7 - Solicitation

1. Solicitations to which the Act applies, require the contracting officer to insert the applicable clause(s):

- a. DAR 7-1903.41 - Service Contracts in Excess of \$2,500**
- b. DAR 7-2003.84 - Statement of Rates for Federal Hires**
- c. DAR 7-2003.85 - SCA Minimum Wages and Fringe Benefits**

Applicable to Successor Contractor Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA)

2. Statement of Equivalent Rates for Federal Hires.

a. The provision at 7-2003.84 shall be inserted in each solicitation for the acquisition of services to which the clause at 7-1903.41(a) applies. In accordance with this provision, the solicitation shall contain a statement of rates for equivalent Federal hire, setting forth those wage rates and fringe benefits that would be paid by the contracting activity to the various classes of service employees expected to be utilized under the contract if 5 U.S.C. 5332 (General Schedule--white collar) and/or 5 U.S.C. 5341 (Wage Board--blue collar) were applicable.

b. Procedures for computation of these rates are as follows:

1.) Wages paid blue collar employees shall be the basic hourly rate for each class. The rate shall be Wage Board pay schedule step two for nonsupervisory service employees and step three for supervisory service employees. Determinations of applicable Wage Board rates are as follows:

a.) Where the place of performance is known, the rates applicable to that location shall be used; or

b.) Where the place of performance is not known, the rates applicable to the contracting activity's location shall be used.

2.) Wages paid white collar employees shall be an hourly rate for each class. The rate shall be obtained by dividing the general pay schedule step one biweekly rate by 80.

3.) Local civilian personnel offices can assist in determining and providing grade and salary data.

4.) The Department of Labor develops standardized fringe benefits. The approved standard and any subsequent modification thereto shall be published in the Defense Acquisition Circular.

Step 8 - Bid Opening or date established for receipt of proposals

1. Situation - The appropriate wage determination was received on time and included in the solicitation. If this is the case, the bid opening should go smoothly according to established procedures.

2. Situation - The appropriate wage determination was not received on time but arrived less than ten days before the opening of bids.

a. The prime criteria is the determination by the contracting officer whether there is or is not reasonable time to incorporate a new wage determination in the solicitation. If he determines that there is not reasonable time, then the new wage determination and revisions shall not apply to this procurement.

3. Situation - The appropriate wage determination was not received on time to include in the solicitation, but arrived more than ten days before the opening of bids.

a. In this case, the contracting officer must make all effort possible to incorporate the new wage determination in the solicitation and notify all interested bidders.

Step 9 - Preaward Survey

1. The preaward survey will be conducted in accordance with the set procedures established by your command.

Step 10 - Award

1. **Conformable Rates** - It is not unusual to have DOL issue wage determinations on only a portion of the classes of service employees performing in a contract. Before awarding a service contract, the contracting officer must be sure that all classes of service employees are covered by fair and reasonable wages. This is the concept of Conformable Rates, and the following procedure can be utilized to determine the rates:

a. The contractor shall classify each employee so as to provide a reasonable relationship between such classifications and those listed in the wage determinations.

b. Wages and fringe benefits are determined by agreement of the interested parties who are:

- (1) contracting agency
- (2) contractor
- (3) employees or their representatives

c. If the interested parties do not agree on a classification or reclassification, the contracting officer shall submit the question together with recommendation for final determination, to the

Administrator
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Washington, D.C. 20210

2. **Notice or Award**

a. Standard Form 99 - Notice of Award of Contract (Exhibit G-8).

Two copies of the SF 99 shall be prepared for:

(1) contracts between \$2,500 and \$10,000 containing the DAR clause 7-1903.41(a)

(2) the initial order (if less than \$10,000) under an indefinite delivery-type contract or BOA containing the clause 7-1903.41(a).

(3) the initial call under a BPA containing the clause 7-1903.41(a)

This form shall be forwarded to:

Administrator
Wage and Hour Division
U. S. Department of Labor
Washington, D.C. 20210

The form shall be completed as follows:

(1) Item 1 through 7 and 12 and 13: self-explanatory;

(2) Item 8: enter the notation "Service Contract Act";

(3) Item 9: Leave blank;

(4) Item 10: (A) enter the notation "Major Category";

and indicate beside this entry the general service area into which the contract falls, and (B) enter the heading "Detailed Description" and, following this entry, describe in detail the services to be performed; and

(5) Item 11: enter the dollar amount of the contract or the estimated dollar value with the notation "estimated" (if the exact amount is not known). If neither the exact nor the estimated dollar value is known, enter "indefinite" or "not to exceed \$ _____".

b. Individual Procurement Action Report (DD Form 350)

Awards of service contracts of \$10,000 or more and orders of \$10,000 or more under indefinite delivery-type contracts and basic ordering agreements are reported to the Department of Labor by the Office

of the Secretary of Defense from information contained in this form.

Therefore, the contracting officer shall not report such awards directly to the Department of Labor.

3. The Contract Review Board (CRB),

At this time it would be prudent to include a discussion on the CRB whose primary function is to ensure that contracts do not leave the activity unless they are in accordance with set policies. The CRB consists of knowledgeable contract personnel (including counsel, small business specialists or technical specialists) who recommend actions to the contracting officer. Its functions include but are not limited to:

- a. weighing justification for sole source
- b. considering competitive aspects of the requirement
- c. considering application of small business
- d. considering urgency and priorities
- e. evaluating the kind and nature of work to be done as nonpersonal services
- f. ensuring the statement of work is conclusive
- g. ensuring the contracting officer's technical representative (COTR) has been approved
- h. reviewing for conflict of interest -- either kind of work or contractor participation.
- i. reviewing the applicability of the Services Contract Act, Walsh-Healey, and Davis-Bacon Acts.

STANDARD FORMS

F-100.99 Standard Form 99: Notice of Award of Contract

<p>Standard Form 99 Revised 8-1-1963 DEPARTMENT OF LABOR Wage and Hour and Public Contracts Divisions 99-104</p>		<p>The notice of award is required pursuant to Article 201, 1701 of Regulations Part 201, issued under 41 U.S.C. 35-45</p>	
<p>NOTICE OF AWARD OF CONTRACT</p>			
1. Department or Agency		2. Branch, Bureau, Division, etc.	
3. Address (Street)	(City)	(State)	(ZIP code)
4. Contractor (Name)			
5. Address (Street)	(City)	(State)	(ZIP code)
6. To be manufactured or supplied by: (other establishments subject to Act) (Firm name)		(City)	(State) (ZIP code)
(a)			
(b)			
(c)			
(d)			
<p>7. Manufacturer (check one) Dealer</p>			
<p>8. Contract No.</p>			
<p>9. Invitation for Bid No.</p>			
<p>10. Commodity description (Indicate the Federal Supply Class No.)</p>			
11. Amount of Contract	12. Date of Award	13. Completion Date	14. Date Form WH-12 and Poster PC-13 mailed

Step 11 - Contract Administration

1. Applicability of Wage Determination - Subsequent to Award. If a required wage determination is not included in the solicitation or contract, either because the required notice was not filed, or is filed out of time, and if the contracting officer receives a wage determination from the Department of Labor within 30 days of the late filing of the notice or the discovery by the Department of Labor of the failure to include a required wage determination --

a. The contracting officer shall attempt to negotiate a bilateral modification:

1.) to incorporate the Service Contract Act clause if not included previously;

2.) to incorporate the wage determination which shall be effective as of the date of issuance unless otherwise specified; and

3.) to adjust equitable the contract price to compensate for any increased cost of performance under the contract caused by the wage determination.

b. If the contracting officer is unable to negotiate a contract modification incorporating the wage determination, he shall document the contract file to show the efforts made.

c. If the contracting officer questions the applicability of the Service Contract Act to the contract in issue, he shall forward the matter for resolution through appropriate channels to the Departmental Labor Relations Advisor. If that office determines that the Act is not applicable to the contract, it shall advise the Department of Labor of the

basis for the determination of inapplicability. The contracting officer need take no further action on the wage determination in the absence of a decision by the Secretary of Labor that the contract is subject to the Act.

The fact that a particular contractor may be obligated by an independent agreement, such as a union contract, to pay higher or lower wages than those stipulated in a Government contract as minimum rates, pursuant to a statute, does not affect either the validity of the rates established by the contract or the contractor's duty to comply with them, and the General Accounting Office cannot review a wage determination, 48 Comp. Gen. 22 (1968).

2. Contract Modifications

a. **Bilateral Contract Modifications.** Generally, a bilateral contract modification affecting the scope of the work is regarded as a new contract for purposes of the Act. (Bilateral contract modifications not related to the contract's labor requirements or containing insignificant changes to the contract's labor requirements shall not be deemed to create a new contract for purposes of the Act.) Prior to entering into such modification, the contracting officer shall forward SF 98/98a to the Administrator, except that --

1.) in the "Estimated Solicitation Date" block, enter the date the wage determination is needed; and

2.) in block 6, enter "Modification of Existing Contract for (describe type of service) Services".

b. **Extension of Contract Through Exercise of Option or Otherwise.** A new contract shall be deemed entered into for purposes

of the Act when the period of performance of an existing contract is extended pursuant to an option clause or otherwise. Prior to extending the period of performance of the contract, the contracting officer shall forward the SF 98/98a.

3. Multiyear Contracts

After the initial submission of the SF 98/98a, the contracting officer shall submit an SF 98/98a on an annual basis at least 30 days prior to the anniversary date on all multiyear contracts subject to the Act. If the new wage determination is different, the contract shall be adjusted accordingly.

4. Violations

a. Any violation of any of the required contract stipulations shall render the contractor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of the contract. Collection of the amount due may be effected by withholding under the contract in question or under any other contract between the same contractor and the Government. These withheld sums shall be held in a deposit fund, and on the order of the Secretary of Labor shall be paid directly to the underpaid employees.

b. Additionally, when a contract stipulation is violated, the contracting agency upon written notice may cancel the contract, secure the services by contract or otherwise, and charge any additional cost of completion to the original contractor.

c. Unless the Secretary of Labor recommends otherwise, no Government contract shall be let to the persons or firms appearing on

the list of violators, or to any firm, corporation, partnership, or association in which these persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of these persons or firms.

d. The Comptroller General is directed to compile and distribute a list to all agencies of the Government giving the names of persons or firms who have been found to have violated this statute.

e. If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the required compensation, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered shall be held in the deposit fund and on order of the Secretary of Labor shall be paid directly to the underpaid employee or employees.

The Secretary of Labor is authorized to hold hearings and make such decisions as are necessary to enforce the provisions of the Service Contract Act. Charges of violations generally are heard by a Labor Department hearing examiner, from whose adverse decision an appeal may be made to the Administrator, Wage and Hour Division, who in turn will recommend to the Secretary whether or not the person so charged is to be placed on the list of violators.

5. Statute of Limitations

The Service Contract Act incorporates Sections 4 and 5 of the Walsh-Healey Act. It does not incorporate Section 2 of that Act which authorizes the United States to sue on behalf of underpaid employees,

and which in turn is governed by the Portal-to-Portal Act which contains a two-year statute of limitations. Since the Walsh-Healey Act was not incorporated in toto in the Service Contract Act, the Government is bound by the general limitation of six years rather than the two-year limitation.

6. Hearings

A successor contractor's obligation cannot be avoided unless it is found after a hearing that such bargained for wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality. Such hearings may be requested by any interested party, including the contractor, a union, or the contracting agency.

7. Cooperation With the Department of Labor

The contracting officer shall cooperate with representatives of the Department of Labor in the examination of records, interviews with service employees, and all other aspects of investigations undertaken by the Department of Labor. When requested, agencies shall furnish to the Administrator any available information with respect to contractors, subcontractors, their contracts, and the nature of the contract services. Violations apparent to the contracting agency and complaints received shall be promptly referred in writing to the appropriate regional office of the Department of Labor (Chapter 6(b) in this guide). In no event shall complaints by employees be disclosed to the employer.

Step 12 - Completion of Contract

1. Contract completion will be effected in accordance with standard organizational procedures.

G-III. CONTRACTOR OBLIGATIONS

The most important obligation imposed upon the contractor is to provide no less than certain specified minimum wages and fringe benefits. These wages and fringe benefits are listed for various classes of employees. The wage and benefit listings are set forth in the Wage Determination, which also defines the classes of employees. In the absence of a Wage Determination, the contractor need only pay his service employees the Federal minimum wage. The contractor must provide fringe benefits either in kind or by some combination of the two. It is the contractor's obligation to determine the proper classification of his employees, in accordance with the definition set forth in the Wage Determination. There is no specific way for the contractor to formally determine that his classification scheme is correct, and will not be subject to later question by the Department of Labor. However, the contractor is able to bring problems arising in this area, as well as any other problem arising regarding the administration of the Act, to the attention of the appropriate Assistant Regional Administrator of the Wage and Hour Division of the Department of Labor.

A Wage Determination may not set forth rates and fringe benefits for all covered employees, however. If this is the case, the contractor has an obligation to "conform" the rates paid to other unclassified employees to those rates which are set forth in the Wage Determination. This conformance procedure is accomplished by the tripartite agreement of the contractor, the contracting officer, and the affected employees.

There are unique rules that apply to "successor" contractors, when any of the predecessor contractors have been subject to a collective bargaining agreement covering service employees. There is a clear statutory duty placed upon successor contractors to pay no less than the wages and fringe benefits to which the unionized employees would have been entitled, had they been employed under the contract. Since this is a statutory duty, it applies notwithstanding the failure of the Wage Determination to set forth the wage rates and fringe benefits under the collective bargaining agreement. Finally, the Service Contract Act also places additional burdens on contractors, including notification requirements, and the obligation to maintain a safe and healthy workplace. Full information is set forth in the Act and implementing Labor Department regulations. [S]

**G-IV. SUMMARY OF THE SERVICE CONTRACT ACT OF 1965
AS AMENDED**

A. INTRODUCTION TO THE ACT

Since its enactment in 1965, the McNamara-O'Hara Service Contract Act has been the cornerstone of service contracting. The purpose of the Service Contract Act (SCA) was to extend to service employees the protections which had already been afforded to workers under construction contracts by the Davis-Bacon Act and the employees under supply contracts by the Walsh-Healey Public Contracts Act. [N:1]

Congress found that employees performing under federal service contracts were generally unskilled, underpaid, and competitively disadvantaged through lack of representation. Further, this condition was subject to exploitation by government contractors who paid the lowest wages and could thus underbid competitors for service contracts by keeping labor costs down. The remedy provided by the SCA was to upgrade and regulate the compensation paid to employees under federal service contracts and to apply labor standards to contractors who do business with the Government through the use of service employees. [N:1]

B. THE ACT (APPENDIX 1)

1. The Service Contract Act of 1965 (P.L. 89-286)

a. The basic intent of the SCA is

- (1) to protect the wages and fringe benefits earned by service employees, particularly when a new (successor) contractor/employer assumes substantially the furnishing of the same services in the same locality;**

- (2) to assure fair and living wages and fringe benefits for service employees; and
- (3) to fill the gap in labor statute coverage of Government procurement (Davis-Bacon Act for construction (roads, buildings, etc.); Walsh-Healey Public Contracts Act for manufacture or furnishing of supplies, equipment, etc.; and, finally, McNamara-O'Hara Service Contract Act for services).

b. It is applicable to every contract (and any bid specification therefor) which is principally for the furnishing of services in the United States through the use of service employees.

c. It calls for making of wage determinations by the Department of Labor (DOL) for service contracts in excess of \$2,500. In the absence of such determination, no less than the minimum wage specified in the Fair Labor Standards Act, as amended, shall be paid service employees.

d. It provides a meaning for "service employees" which strongly infers that such employees are "blue collar" workers.

e. The Secretary of Labor is given latitude in administration of the SCA. (Examples: Making wage determinations is not mandatory; certain classifications of "white collar" workers are determined to be service employees.)

C. AMENDMENTS OF OCTOBER 1972, EFFECTIVE 9 OCTOBER 1972
(P. L. 92-473)

1. Where a predecessor/successor situation exists (substantially the same services performed), the predecessor contractor's labor agreement shall determine the minimum wages and fringe benefits (present and prospective) to be paid/provided successor contractor's service employees to be used under the successor contract.

2. Every contract (and bid specification therefor) shall contain a statement of Wage Board ("blue collar") rates which would be paid service employees expected to be used under such contract if such employees were Federal hires instead of contractor employees. DOL will give "due consideration" to such rates when making its wage determinations.

3. The Secretary of Labor's administrative latitude is significantly reduced. (Example: The Secretary shall make a wage determination for every service contract as soon as administratively feasible. As of 1 July 1977, a wage determination shall be made when more than five (5) service employees are to be used under the service contract.)

D. AMENDMENTS OF OCTOBER 1976 EFFECTIVE 13 OCTOBER 1976
(P. L. 94-489)

1. The meaning of "service employee" is clarified to reflect the previously-held intent of Congress and DOL. The meaning now encompasses all persons working under service contracts other than those individuals in bona fide executive, administrative, and professional capacities as defined in 29 CFR Part 541. Thus, service employees clearly are both "blue collar" and "white collar" workers and, as such, contracts for clerical, computer, technical and most engineering services are (undisputedly) subject to the SCA.

2. All service contracts (and bid specifications therefor) shall contain a statement of General Schedule ("white collar") rates which would be paid such classifications of service employees expected to be used under the service contract if they were Federal hires instead of contractor employees. DOL shall give "due consideration" to such rates in making wage determinations.

G-V. DEFINITIONS

A. For the purpose of this guide, the terms used here are defined as follows:

1. "Service employee" means any person employed in connection with a contract entered into by the United States and not exempted under Section 7 of the Act (41 U. S. C. 356), whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR, Part 541): and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

2. "United States" shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands, as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.), American Samoa, Guam, Wake Island, but shall not include any other territory under the jurisdiction of the United States or any U. S. base or possession within a foreign country.

3. "Administrator" means the Administrator of the Wage and Hour Division, United States Department of Labor, or the Administrator's authorized representative.

4. "Contract" includes any contract subject wholly or in part to provisions of the Act and any subcontract at any tier thereunder.

5. "Contractor" includes a subcontractor whose subcontract is subject to provisions of the Act.

6. "Wage Determination" includes any determination of minimum wage rates or fringe benefits made pursuant to the provisions of Section 2(a) and 4(c) of the Act (41 U. S. C. 351 and 353) for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of \$2,500 that is subject to the provisions of the Act.

7. "Compensation" means any payment or fringe benefit.

B. DEFINITIONS OF TERMS UTILIZED IN THE PROVISIONS OF THE SCA.

The provisions of the SCA apply to contract, the principal purpose of which is to furnish services in the United States through the use of service employees. However, the SCA does not define the type of services which fall within its coverage. The key words are "principal purpose", for if the principal purpose of a contract is to provide something other than services of the character contemplated by the SCA, that Act does not apply. DOL in its regulations implementing and interpreting the SCA (29 C.F.R. 4) advises that there is no hard and fast rule which can be laid down as to the precise meaning of the term "principal purpose". Rather, it is a question to be determined on the basis of all the facts in each particular case. (Section 4.111)

Sections 4.111 and 4.113 of the regulations do suggest that the term "principal purpose" only modifies "services" and not "service employees". Thus, if a contract's purpose is to procure services, it is covered by the SCA. Once a contract has been determined to be

covered, the next and corollary question is: Will any "service employees" be used within the definition of the SCA? Most service contracts will ordinarily be performed by service employees within the SCA's definition. However, there are two exceptions. One is the specific exclusion in the SCA of executive, administrative and professional employees. The other is the "incidental use" test which is a creature of the DOL regulations.

Executives, administrative and professionals are not to be deemed "service employees" for purposes of the SCA's definition of the same. The SCA incorporates by reference the definitions of these personnel as they appear in Part 541 of Title 29, Code of Federal Regulations. (29 C. F. R. 541) (1976) Extracts from the definitions contained in Part 541 are provided as follows:

1. Executive. The term "employee employed in a bona fide executive capacity" shall mean any employee:

a. Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

b. Who customarily and regularly directs the work of two or more other employees therein; and

c. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

d. Who customarily and regularly exercises discretionary powers. [N:5]

2. Administrative. The term "employee employed in a bona fide administrative capacity" shall mean any employee:

- a. Whose primary duty consists of either:
 - (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or
 - (2) The performance of functions in the administration of a school system, or of a department or subdivision thereof, in work directly related to the academic instruction of training carried on therein; and
- b. Who customarily and regularly exercises discretion and independent judgment; and
- c.
 - (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or
 - (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or
 - (3) Who executes under only general supervision special assignments and tasks. [N:6]

3. Professional. The term "employee employed in a bona fide Professional capacity" shall mean any employee:

- a. Whose primary duty consists of the performance of:
 - (1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical process, or
 - (2) Work that is original and creative in character in a recognized field or artistic endeavor (as opposed to work which can be produced by a

person endowed with general manual or intellectual ability and training), and the results of which depends primarily on the invention, imagination, or talent of the employee, or

- (3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and

- b. Whose work requires the consistent exercise of discretion and judgment in its performance: and

- c. Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. [N:7]

G-VI. APPLICABILITY

A. GENERAL

As stated in the Act, the SCA applies to all "... contracts (and any bid specification therefor) the principal purpose of which is to furnish services in the United States through the use of service employees". DOL interprets "principal purpose" as applying only to the furnishing of services "within the United States" and "through the use of service employees" considered separate and subordinate. This interpretation together with the broad definition of "service employee" and the administrative and enforcement authority given DOL has resulted in DOL's determination of SCA applicability to many contracts for R & D, professional engineering, equipment overhaul and modification, and ADPE operation and maintenance.

B. DEPARTMENT OF LABOR REGULATIONS

The Department of Labor has issued 29 CFR, Parts 4 and 1910, providing for the administration and enforcement of the Act. The regulations include coverage of the following matters relating to the requirements of the Act:

1. Service Contract Labor Provisions and Procedures, 29 CFR, Subpart A, Part 4 (Appendix 2)
2. Equivalents of Determined Fringe Benefits, 29 CFR, Subpart B, Part 4 (Appendix 2)
3. Application of the Act of 1965 (Rulings and Interpretations) 29 CFR, Subpart C, Part 4 (Appendix 2)

4. Safe and Sanitary Working Conditions, 29 CFR, Part 1910
(Appendix 3)

5. Rules of Practice for Administrative Proceedings Enforcing
Service Contract Labor Standards, 29 DFR, Part 6 (Appendix 4)

C. Both the DOL regulations in Section 4.130 and the DAR in 22-101(b) list examples of the types of service contracts of which the principal purpose is to furnish services through the use of service employees. The variety of covered service contracts is most assuredly increasing, especially in light of the addition of the 1979 Amendments of white collar personnel. The following are some examples of areas that could qualify as service contracts: [1]

1. Maintenance, overhaul, repair, servicing, rehabilitation, salvage, and modernization or modification of supplies, systems and equipment;

2. Maintenance, repair, rehabilitation, and modification of real property;

3. Architect-Engineering;

4. Expert and consultant services;

5. The services of DOD-sponsored organizations;

6. Installation of equipment obtained under separate contract;

7. Operation of Government-owned equipment, facilities, and systems;

8. Engineering and technical services;

9. Housekeeping and base services;

10. Transportation and related services;

11. Training and education;
12. Medical services;
13. Photographic, printing and publication services;
14. Mortuary services;
15. Communications services;
16. Test services;
17. Data processing;
18. Warehousing;
19. Auctioneering;
20. Arbitration;
21. Stevedoring; and
22. Research and development.

D. CATEGORIES OF SERVICE CONTRACTS

The armed forces generally categorize service contracts as follows:

1. Expert and consultant services. These support services are performed by personnel who are exceptionally qualified, by education or experience, in a particular field to perform some specialized service. OMB 78-11, Guidelines for the Use of Consulting Services, further defines consulting services to mean those services of a purely advisory nature relating to the governmental functions of agency administration and management and agency program management. In view of the growing concern on the use of these types of services, the Commander, Naval Supply Systems Command issued a notice on 21 July 1980 that addressed Consulting Service Contracts. This notice is contained in Appendix 5 for your reading. [M:15]

2. Contractor Support Services. These are services of a white collar, professional nature involving performance in support of Navy Programs, such as scientific/technical studies and analysis, test and evaluation support, budgetary/financial analysis, ADP support, reliability and maintainability support, cost analysis, and general management support. [M:15]

3. Commercial or Industrial (C/I) Activities Support Services. These are overhead or program support services which are not essential to the management control of Navy programs. The major thrust of this effort is in the blue collar area such as janitorial, transportation, or general services. However, C/I services may involve efforts similar to those described above as contractor support services. The major difference between these two types of services is that the C/I activities support services call for contracting out of entire functions while Contractor Support Services involves the contracting out of a specific effort or task in support of a continuing in-house activity or capability. [M:15]

E. PERSONAL SERVICES VERSUS NONPERSONAL SERVICES

All service contracts are further categorized as either personal services or nonpersonal services. With the exception of Experts and Consultants employed by personnel officers in accordance with the Federal Personnel Manual, personal service contracts are not permitted. Nonpersonal services are an approved resource that may be used in the accomplishment of assigned missions by contracting out for contractor support services, Commercial or Industrial Activities support services, or consultant services procured by contracting officers in accordance

with the DAR. The distinction between personal and nonpersonal services is not always clear and many factors are considered in reaching a determination as to whether a particular service, situation, contract, or contract performance is personal or nonpersonal in nature. However, in general, a personal service contract is one in which the contractor or his employees are, in effect, Government employees. This situation occurs when a "master-servant" or "employer-employee" relationship exists. [M:16] Generally a local form such as the NAVAIR Form 4350/7 (11-76) (Exhibit G-9) is utilized by the Contracting Officer to answer the personal services versus nonpersonal services question.

F. DOL'S INTERPRETATION OF APPLICABILITY

In order to really decide whether the SCA applies or not, the contracting personnel must understand just how DOL is interpreting the Act. As was mentioned earlier, the provisions of the SCA apply to contracts the principal purpose of which is to furnish services in the United States through the use of service employees. The key words are "principal purpose", and the DOL regulations do suggest that the term only modifies "services" and not "service employees". Therefore a contract is covered by the SCA if it is determined that the contract's purpose is to procure services.

How does DOL utilize the "principal purpose" term on "service employees"? Once a contract is determined to be covered, DOL then puts its two exceptions to the test. One is the specific exclusion in the SCA of executive, administrative and professional employees. The other is the "incidental use" test. For procurements under which it is

SERVICES QUESTIONNAIRE

Requirements Document Number _____

The following questions are to be answered by the individual initiating the requirement for contractor services.

1. THE NATURE OF THE WORK

(A) To what extent can the Government obtain civil servants to do this work? _____

(B) Does the proposed contractor have specialized knowledge or equipment which is unavailable to the Government? If the answer is affirmative, describe. _____

(The two factors above might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.)

(C) To what extent do the services represent the discharge of a Government function which calls for the exercise of personal judgment and discretion on behalf of the Government? (This factor, if present in a sufficient degree, may alone render the service personal in nature.) _____

(D) To what extent is the requirement for services to be performed under the proposed contract continuing rather than short-term or intermittent? (This factor might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.) _____

EXHIBIT G-9

2. CONTRACTUAL PROVISIONS CONCERNING THE CONTRACTOR'S EMPLOYEES

(In considering the following, it should be noted that supervision and control of the contractor or his employees, if present in a sufficient degree, may alone render the services personal in nature.)

(A) To what extent does the Government specify the qualifications of, or reserve the right to approve individual contractor employees? (Granting or denying security clearance and providing for necessary health qualifications are always permissible controls over contractor employees; also, it is permissible to some extent to specify in the contract the technical and experience qualifications of contractor employees, if this is necessary to assure satisfactory performance.)

(B) To what extent does the Government reserve the right to assign tasks to and prepare work schedules for the contractor employees during the performance of the contract? (This does not preclude inclusion in the contract, at its inception, of Work schedules for the contractor, or the establishment of a time of performance for orders issued under a requirements or other indefinite delivery-type contract.)

(C) To what extent does the Government retain the right (whether actually exercised or not) to supervise the work of the contractor employees, either directly or indirectly? _____

(D) To what extent does the Government reserve the right to supervise or control the method in which the contractor performs the service, the number of people he will employ, the specific duties of the individual employees, and similar details (it is always permissible to provide in the contract that the contractor's employees must comply with regulations for the protection of life and property; also, it is permissible to specify a recommended, or occasionally even a minimum, number of people the contractor must employ, if this is necessary to

assure performance--but in that event it should be made clear in the contract that this does not in any way minimize the contractor's obligation to use as many employees as are necessary for proper contract performance.) _____

(E) To what extent will the Government review performance by each individual contractor employee, as opposed to reviewing a final product on an overall basis after completion of the work? _____

(F) To what extent does the Government retain the right to have contractor employees removed from the job for reasons other than misconduct or security? _____

3. OTHER PROVISIONS OF THE CONTRACT

(A) Are the services properly defined as an end product? (A report is not an end product if the primary purpose of the contract is to obtain the contractor's time and effort and the report is merely incidental to the purpose.) _____

(B) Is the contractor undertaking a specific task or project that is definable either at the inception of the contract or at some point during the performance, or is the work defined on a day to day basis? (This does not preclude use of a requirements or other indefinite delivery-type contract, provided the nature of the work is specifically described in the contract, and orders are formally issued to the contractor rather than to individual employees.) _____

(C) Will payment be for results accomplished or solely according to time worked? (This is a factor which might be useful in a doubtful

EXHIBIT G-9

case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.) _____

(D) To what extent is the Government to furnish the office or working space, facilities, equipment, and supplies necessary for contract performance? (This is a factor which might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.) _____

4. ADMINISTRATION OF THE CONTRACT

(A) To what extent are contractor employees used interchangeably with Government personnel to perform the same functions? _____

(B) To what extent are the contractor employees integrated into the Government's organizational structure? _____

(C) To what extent are any of the elements in (2) and (3) above present in the administration of the contract, regardless of whether they are provided for by the terms of the contract? _____

Certified by: _____ (Signature) _____ (Code) _____ (Date)

EXHIBIT G-9

Requirements Approval

As _____ I have reviewed the
services questionnaire and accompanying documentation and hereby
approve/disapprove the proposed requirement for contractor services.
Approval does not constitute a determination that any proposed contract
is in conformance with applicable law and regulations.

(Name)

(Code)

(Date)

EXHIBIT G-9

THIS FORM TO BE COMPLETED FOR PROCUREMENTS PROCESSED
AT NAVAIR HQ

Counsel Opinion

As Counsel, I have reviewed the proposed contract for contractor services for conformance with the applicable law and regulations and the following are my comments:

(Name) (Date)

Contracting Officer Determination

As contracting officer, I hereby determine that the proposed contract for contractor services is/is not proper and in conformance with applicable regulations.

(Name) (Code) (Date)

Approval of Determination

APPROVED: _____
(Name) (Code) (Date)

EXHIBIT G-9

known that the services of only executives, administrators, and professionals will be used, the SCA will have no application. The problem arises, however, when there is a mixture in one contract of service employees and exempted employees, as is the case with certain research and technical type contracts. In this eventuality, DOL regulations provide some limited guidance in their discussion of "incidental use" of service employees. [N:7]

Section 4.113(a)(2) of the regulations provides in pertinent part:

. . .any contract for professional services which is performed essentially by professional employees, with the use of service employees being only a minor factor in the performance of the contract, is not covered by the Act. While the incidental use of service employees will not render a contract for professional services subject to the Act, a contract which requires the use of service employees to a substantial extent would be covered even though there is some use of professional employees in performance of the contract.

Confusion results, of course when the regulations do not specify what is meant by the terms "incidental" and "substantial extent". When a contract for the services of exempted employees (i.e., bona fide professionals) will involve the use of some "service employees", the question arises whether the use of the latter group then brings the contract within the SCA. The determination must be made whether the extent of their use is incidental or substantial. The regulations do not specify what extent of service employee participation in this situation will trigger the application of the SCA. The Administrator of the Wage and Hour Division of DOL has in some previous opinions determined that as low as 15% non-exempt employee usage on service contracts is sufficient to apply SCA coverage to those employees working under the contract. However, there are no "percentage precedents" stated in the regulations

and it would appear that DOL considers this area to involve questions of fact to be addressed on a case by case basis. Presumably it would employ the factual analysis approach referenced in Section 4.111(a) of the regulations which it relies upon to determine the "principal purpose" of a contract. [N:8]

G. CONTROVERSIAL AREAS OF SCA APPLICABILITY

Ever since its inception in 1965, there have been areas of SCA coverage under dispute between DOL and DOD. Throughout the years many disputes had to be settled by the Comptroller General. The following discussions are on areas that are still in dispute:

1. SCA Applicability to Equipment and Modification. Over the years DOD has in good faith determined that equipment overhaul and modification is principally the furnishing of supplies and materials and therefore subject to the Public Contracts Act. Throughout these same years, DOL on a case-by-case basis has determined that such contracts are principally for services and subject to the SCA. However, DOL has not issued either a ruling and interpretation or a policy memorandum to Heads of all agencies stating that all such contracts are subject to the SCA. Knowing that DOL might take such action at any time (particularly after a significant Com. Gen. decision of 1 June 1978 (B-190505; B. B. Saxon Co., Inc.) which upheld DOL's authority to apply SCA to overhaul and modification unless DOL's determination was clearly contrary to law), DOD referred the matter of equipment overhaul and modification to the Administrator (Mr. Les Fettig), OFPP. Although restricting equipment to engines, Mr. Fettig gave the DOD request favorable

consideration and initiated action overruling DOL without first discussing the matter with the Secretary of Labor. This action met with the displeasure of the Secretary of Labor and with the Congressional Labor Subcommittees. Eventually, actions initiated by Mr. Fettig were withdrawn upon receipt of a SecLabor letter of 10 October 1978 which informed SecDef that the matter was under active review to determine applicability of appropriate labor statute and that a one-year exemption from applying the SCA to engine overhaul and modification was granted. A short time after this, Mr. Fettig departed his position. The question of final authority in SCA matters arose from this situation. It was referred to the Attorney General who later on in a 9 March 1979 opinion advised the President that final authority rests with SecLabor. In mid 1979, DOD and DOL officials met and developed a draft definition/description of equipment overhaul and modification work which might be subject to the Public Contracts Act. Since that time, the draft definition/description has been undergoing review at high levels within DOL. When such review will be completed is now known. SecLabor has extended the engine exemption for an indefinite period. Meantime, DOD continues to apply the Public Contracts Act to equipment overhaul and modification contracts. Should overhaul and modification contracts finally be determined by DOL to be applicable to the SCA, at least two important Navy contractors have stated they will not accept SCA provisions. These contractors are Litton and Varian. [L:5]

2. SCA Applicability to Research and Development (R & D) Contracts.
Dr. Perry, USD R & E, wrote SecLabor Marshall on 2 April 1980 expressing concern that DOL's proposed revisions to SCA regulations at 29 CFR Part 4

(published in the Federal Register of 28 December 1978) for the first time explicitly apply SCA provisions to R & D contracts (DOL adds R & D to a listing of services to which the SCA is applicable). Further, Labor's extension of SCA protections to more highly skilled workers in the R & D field such as laboratory technicians who are quite adequately compensated is questioned. The letter states that application of the SCA in the past to R & D contracts has been a rarity. Finally, Dr. Perry points out that the application of the SCA to R & D contracts is not consistent with the SCA in that the SCA "clearly states that it is to be applied to contracts where 'the principal purpose ... is to furnish services ... through the use of service employees'." Summarizing, the USD R & E does not believe the SCA applicable to R & D contracts and suggests that if DOL intends to apply the SCA to R & D it should seek "specific new legislation from the Congress". We are unaware of any SecLabor response to this letter. It is perhaps better that there has been no response when giving consideration to the Amendments of October 1976 and the authority of SECLABOR/DOL in making determination of applicability would indicate the greater likelihood that DOD should be (i) applying the SCA and (ii) seeking specific new legislation from the Congress to remove R & D from SCA coverage and limit the administrative and enforcement authority of DOL. [L:6]

3. Applicability of SCA to ADPE Maintenance. In mid 1979, DOL discovered that GSA schedule contracts for purchase/lease/maintenance of ADPE did not contain SCA provisions applicable to the maintenance portion (considered a separate bid specification; also, customers were placing maintenance only orders under these schedule contracts). Labor

directed GSA to apply the SCA. The incorporation of the SCA in solicitations for FY 80 schedules met resistance from several manufacturers/servicers by their refusal to accept SCA provisions (the industry pays its technicians based on a relatively low minimum rate supplemented by merit/incentive pay; the DOL wage determinations set forth minimum rates substantially higher) (also, the industry would be reluctant to open up its payroll and other records to DOL as such records if disclosed to the public could erode a company's competitive posture). GSA's FY 80 problems were alleviated when DOL permitted award of schedule contracts without SCA provisions through 7 November 1979. Throughout this period, DOL and industry officials attempted to resolve the problem. An interim nationwide wage determination issued by DOL in November 1979 reduced the number of major companies refusing to accept SCA provisions to two (2) (Hewlett Packard & Digital Equipment Corp.). When confronted with direct contracting (sole source) with these companies, the DUSD R & E (AP) approved procedure of using purchase orders of \$2,500 or less was implemented. In June 1980, following continued attempts to resolve the matter, DOL issued a revision to its wage determination of 30 November 1979. Hewlett Packard in a July 1980 open letter has stated it will accept the revised determination which will be applicable for the life of the contract to which it is incorporated. Other heretofore unwilling companies are expected to follow suit. It appears, for the time being at least (FY 81 procurement), that the problem will dissipate without further pursuing the matter. [L:5]

G-VII. STATUTORY EXEMPTIONS AND LIMITATIONS

A. The Services Contract Act shall not apply to the following:

- 1. Any contract of the United States of District of Columbia for construction, alteration, and/or repair, including painting or decorating of public buildings or public works;**
 - 2. Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);**
 - 3. Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect, or where such carriage is subject to rates covered by Section 22 of the Interstate Commerce Act;**
 - 4. Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;**
 - 5. Any contract for public utility services, including electric light and power, water, steam, and gas;**
 - 6. Any employment contract providing for direct services to a Federal agency by an individual or individuals; and**
 - 7. Any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations;**
 - 8. Any services to be furnished outside the United States.**
- For geographic purposes, the "United States" is defined in Section 8(d) of the Act to include any State of the United States, the District of Columbia, Puerto Rica, the Virgin Islands, the Outer Continental Shelf**

Lands, as defined in Outer Continental Shelf Lands Act, American Samoa, Guan, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island. It does not include any other territory under the jurisdiction of the United States or any U. S. base of possession within a foreign country.

9. Any of the following contracts exempted from all provisions of the Act, pursuant to Section 4(b) of the Act, which exemptions the Secretary of Labor, prior to amendment of such section by Public Law 92-473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

a. Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom; and

b. Any contract entered by the U. S. Postal Service with an individual owner-operator for mail service where it is not contemplated at the time the contract is made that such owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness or accident.

B. DISCUSSION

Section 7 of the SCA enumerates the above specific exemptions from its coverage. Of the exemptions listed, the first two have historically been the most troublesome for procuring agencies. These exemptions are:

1. any contract of the United States or District of Columbia for construction, alteration and/or repair, including printing and decorating of public buildings or public works;

2. any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036).

While the Section 7(1) exemption for construction contracts does not identify the Davis-Bacon Act by name, its language corresponds to that used in Davis-Bacon to describe that Act's coverage. The exemption specifies that construction "contracts" themselves do not come within the SCA's coverage. There is a considerable amount of debate between DOL and the procuring agencies on this exemption. The agencies assert that any contract for construction is exempt, regardless of its amount or that it may involve less than 100% construction work. DOL takes a different position as evidenced in part by its discussion in Section 4.116 of its regulations. It is stated there that a given construction contract may also share SCA coverage and thus have dual coverage. DOL envisions mixed contract situations where there is construction activity concomitant with the performance of service work. In these cases, if each type of work is functionally segregable and meets statutory dollar minima, then one contract may combine Davis-Bacon and SCA coverage.

DOL fortifies its regulation on the SCA's construction contract exemption with examples of dual coverage. One such example in Section 4.116 is a contract which, for the convenience of the Government, combines construction work and maintenance work with separate specifications for each. Thus, a contract may call for the installation of a plumbing system and also for maintenance of the system thereafter. That portion

the contract calling for installation work (construction) is covered by the Davis-Bacon Act and its provisions and clauses are applicable to it.

That portion involving maintenance work (services) qualifies for SCA coverage and the associated provisions and clauses apply.

The exemption in Section 7(2) of the SCA for Walsh-Healey work has not generated the controversy as the 7(1) exemption. The reason is due to the language of the exemption itself which cites Walsh-Healey "work" rather than "contracts" as being exempt from the SCA. This leaves the door clearly open to dual coverage in that Walsh-Healey work and SCA work can be combined in one contract. Requirements for the manufacturing or furnishing of supplies may also involve the maintenance and servicing of the same supplies. For example, a contract for the supply portion of the contract meets the Walsh-Healey Act dollar amount of \$10,000, then that Act and its compensation provisions apply to that contract portion. For the portion involving maintenance and repair, it is the "principal purpose" to furnish services through the use of service employees and thus the SCA is activated.

C. ADMINISTRATIVE LIMITATIONS, VARIATIONS, TOLERANCES, AND EXEMPTIONS

The Secretary of Labor, only in special circumstances, may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of the Act as the Secretary may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business (41 U. S. C. 353(b)). Requests for

variations, tolerances, and exemptions from the Act shall be submitted in writing through contracting channels to the departmental labor advisor.

G-VIII. QUESTIONS CONCERNING THE SCA

A. APPLICABILITY

In the even the contracting officer questions the applicability of the Act to an acquisition, the matter shall be forwarded for resolution, prior to issuance of the solicitation, as follows:

1. For the Navy

Mr. Richard H. Hedges, Labor Relations Advisor
Headquarters Naval Material Command (MAT 08C4L)
Department of the Navy
Washington, D.C. 20360
(202) 692-7521
Autovon 222-7521

2. For the Army

MAJOR Ron Frankel
Office of the Assistant Secretary of the Army (RDA)
Attention: Labor Advisor
Washington, D.C. 20310
(202) 695-4369

3. For the Air Force

Mr. James H. Micklish
Headquarters, U. S. Air Force/RDCM
Washington, D.C. 20330
(202) 697-1879

4. For DCA (Defense Communications Agency)

Defense Communications Agency Headquarters
Attention: Counsel

5. For DMA (Defense Mapping Agency)

Staff Director of Logistics

6. For DNA (Defense Nuclear Agency)

Deputy Director of Operations and Administration

7. For DLA (Defense Logistics Agency)

Deputy Director (Contract Administrative Services)
Attention: DLA-HP

B. CONTRACTORS INQUIRIES CONCERNING THE ACT

Contractors or contractor employees who inquire concerning the administration and enforcement of the Act shall be advised that such matters fall within the jurisdiction of the Department of Labor and shall be given the address of the appropriate Assistant Regional Administrator of the Wage and Hour Division of the Department of Labor.

1. Wage and Hour Division of the United States Department of Labor Regional Offices--Geographical Jurisdictions and Addresses of Regional Directors.

Region I--Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut--JFK Federal Office Building, Boston, MA 02203.

Region II--New York, New Jersey, Puerto Rico, Virgin Islands--1515 Broadway, New York, NY 10013.

Region III--Pennsylvania, Maryland, Delaware, Virginia, West Virginia, District of Columbia--3535 Market Street, Philadelphia, PA 19104.

Region IV--North Carolina, South Carolina, Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida--1371 Peachtree Street, Atlanta, GA 30309.

Region V--Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota--230 Dearborn Street, Chicago, IL 60604.

Region VI--Louisiana, Arkansas, Oklahoma, Texas, New Mexico--555 Griffin Square Building, Dallas, TX 75201.

Region VIII--North Dakota, Montana, Wyoming, South Dakota,
Colorado, Utah--Federal Office Building, 1961 Stout Street, Denver, CO
80202.

Region IX--California, Nevada, Arizona, Hawaii, Guam--
450 Golden Gate Avenue, San Francisco, CA 94102.

Region X--Washington, Oregon, Idaho, Alaska--Federal Office
Building, 909 First Avenue, Seattle, WA 98104.

C. MISCELLANEOUS QUESTIONS ON THE SCA

If you have a question on the SCA that is specific to your field,
contact the appropriate Navy Labor Relations Personnel. The following
is the most current roster:

ROSTER OF NAVY LABOR RELATIONS PERSONNEL

Mr. Richard H. Hedges (Code MAT 08C4L)
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Mr. Ernest Bernhardt (Code 05A)
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Telephone: (202) 433-4151

Mr. Frank Chieffalo (Code 05A)
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Naval Facilities Engineering Command
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Naval Facilities Engineering Command
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Mr. Thomas V. Clark (Code FAC 021A)
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Miss Lorraine Lau (Code 05A)
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5610 Kitsap Way, P.O. Box UU, Wycoff Station
Bremerton, WA 98310
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D. LEGAL QUESTIONS; OFFICE OF THE GENERAL COUNSEL, DEPARTMENT
OF THE NAVY

FIELD OFFICES

<u>Location</u>	<u>Office, Address, and Telephone</u>
CALIFORNIA Camp Pendleton 92055	Paul R. Speckman Counsel, Western Bases, U.S. Marine Corps, Marine Corps Base (AC 714 725-5610)
China Lake 93555	Dennis Valentine Counsel, Naval Weapons Center (AC 714 939-2205)
Long Beach 90822	Donald S. Safford, Regional Counsel Counsel for the Officer in Charge Naval Regional Contracting Office (AC 213 547-6676)
Oakland 94625	William F. Finnegan, Regional Counsel Counsel, Naval Supply Center (AC 415 466-6371)
Oakland 94625	Harley E. Dilcher Counsel, Military Sealift Command, Pacific Building 310, Naval Supply Center (AC 415 466-6481)
San Francisco 94105	N. Jean Wilcox Counsel, Civilian Personnel Law/Litigation Division, Western Field Division 525 Market Street, Rm. 3522 (AC 415 765-6471)
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San Diego 92152	Stephen E. Katz Counsel, Naval Supply Center (AC 714 235-3311)
San Diego 92136	Michael A. Reilly Counsel for the Supervisor of Shipbuilding, Conversion and Repair, USN (AC 714 235-1857)

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4. CDR. R. Mayes
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5. LCDR. J. Gibson
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G-IX. ROLE OF THE DEPARTMENT OF LABOR

A. RESPONSIBILITIES OF DOL

Section 4(a) of the SCA empowers the Secretary of Labor to enforce the SCA, make rules, regulations, issue orders, hold hearings, make decisions upon findings of fact, and take other appropriate action. Under 4(b) he may also make reasonable limitations and exemptions from the provisions of the SCA in special circumstances. DOL has relied on this broad grant of authority to make official rulings and interpretations with respect to the application of the SCA.

In enforcing the Act, DOL has very substantial powers in aid of its statutory mission. These powers include the ability to audit the contractor's books and records and withhold sums allegedly due as a result of underpayments from contract proceeds due the contractor under any Government contract. The most formidable sanction at the disposal of the Labor Department, however, is the ability to debar a contractor for a period of three years, upon a showing of violation of the Service Contract Act.

B. REVIEWABILITY

With the enactment of the 1972 Amendments to the SCA, DOL became more diligent and productive in its issuance of wage determinations. This increase in determinations highlighted the key question of the authority for outside review of such determinations. [N:20]

A significant challenge to DOL's implementation of the SCA was made in Descomp v. Sampson, supra. In a GSA contract for keypunching

services, the plaintiff contractor took issue with DOL's position that these services were subject to the SCA, that keypunchers were "service employees", and argued that DOL's ruling on "locality" was in error. Relying on the provisions of the Administrative Procedure Act and the decision of Scanwell Laboratories, Inc. v. Shaffer, (C.A.D.C.)

424 F. 2d 859 (1970), and Keco Industries, Inc. v. United States, 428 F. 2d 1233 (1970), 192 Ct.Cl. 773 (1970), the Court held that DOL wage determinations are judicially reviewable to the extent that they may violate the SCA or DOL's own regulations promulgated under it. [N:20]

The Court applied two standards of review to the issues raised by the Plaintiff. On the questions of whether the contract was one for services and whether the keypunchers were service employees, the Court confined its review to a "rational basis" test because such determinations were questions of fact where DOL was permitted a large degree of administrative discretion. As to the propriety of DOL's "locality" ruling on the contract, a broader "substitution of judgment" test was used on the basis that this determination went directly to statutory interpretation, congressional intent, and was a question of law. [N:20]

While finding that the contract was one for services and within the coverage of the SCA, the Court set aside DOL's determination that the keypunchers were service employees, essentially because they were "white collar" employees whereas the SCA's purview was the "blue collar" employee category. DOL's determination as to the proper locality to be used for setting contract wage rates was also invalidated as a result of the Court's examination of the congressional history of the SCA and the

federal procurement laws. The Plaintiff was also found to have the requisite standing to challenge DOL's wage determination because as a Government contractor it was within the zone of interest to be protected by the procurement statutes which were considered relevant to the case. [N:20]

The ruling in Descomp that the SCA did not cover white collar employees was, of course, legislatively overruled by the 1976 amendments to the SCA which extended coverage to such employees. The Court's judgments on standing and reviewability however, would appear to remain as good law. The impact of the Descomp decision as to the locality issue is questionable in light of DOL's adherence to its own application of that rule. [N:21]

Two other federal jurisdictions dealt squarely with the subject of the reviewability of DOL's wage determinations issued pursuant to the SCA. In Curtiss-Wright Corp. v. McLucas; 364 F. Supp. 750 (D.N.J. 1973), the Court stated that the Secretary of Labor's determination whether or not a particular Government contract is subject to the SCA is not judicially reviewable. Conversely, in Federal Electric Corporation v. Dunlop, 419 F. Supp. 221 (M.D. Fla. 1976), vacated as moot No. 76-2507 (5th Cir. - January 21, 1977), it was held that the Secretary's judgment on the applicability of the SCA to job classifications must have "warrant in the record" and a reasonable basis in law. As in Descomp, the Court in Federal Electric had ruled that the SCA's coverage did not include white collar employees and this ruling was similarly vitiated by the 1976 SCA Amendments. For a decision on the

reviewability of a contracting agency's failure to use a wage determination issued pursuant to the Davis-Bacon Act, see International Union of Operating Engineers v. Arthurs, 355 F. Supp. 7 (W.D. Okla. 1973), aff'd 480 F. 2d 603 (10th Cir. 1973). [N:21]

Another aspect of the reviewability issue is the judicial reaction to those occasions when DOL does not make wage determinations after requests therefor. In Kentron Hawaii Ltd., et al. v. Warner, 480 F. 2d 1166 (D.C. Cir. 1973), the District of Columbia Circuit recognized DOL's discretion not to make a wage determination for a Navy procurement covered by the SCA. While taking notice of the restrictions in the 1972 SCA Amendments on DOL's discretion not to issue wage determinations, the Court found that DOL had properly invoked the SCA's Section 4(b) exemption powers in declining to render a determination. Two factors operated to support this conclusion:

1. the procurement was multifaceted in terms of classifications and locations and DOL lacked sufficient resources to render a timely determination.
2. the Navy had violated the SCA and the ASPR (now the DAR) in omitting from its SF 98 submitted to DOL wage information which was readily available to it.

On the procedural question of standing, contractor employees and their unions are given judicial standing to oppose DOL wage determinations that adversely affect them. International Union of Operating Engineers v. Arthurs, supra; International Association of Machinists & Aerospace Workers v. Hodgson, supra. Such standing is afforded to service

employees and their representatives because they are arguably within the zone of interests to be protected by the labor standards statutes. It appears, however, that no standing is recognized under the SCA unless the employees have been affected by agency action relative to their employer's contract with the Government. AFGE v. Dunn, 561 F. 2d 1310 (9th Cir. 1977). [N:22]

The Comptroller General has assumed a posture of nonintervention with DOL wage determinations. Review of a wage determination issued under the SCA was declined in 48 Comp. Gen. 22 (1968) on the basis of GAO's conclusion that the SCA protested a contract wage rate minimum which had been established by DOL. Any damage sustained as a result of compliance with the wage determination which was issued pursuant to law, GAO found, was "irremediable". [N:22]

Another important aspect of this Comp. Gen. decision was the significance of DOL's wage determination as being the minimum rate to be paid under a service contract. If a contractor finds that he cannot employ labor at the DOL minimum rate in order to perform the contract but must pay higher rates, this does not affect the validity of DOL's wage determination. *DOL's determination of minimum rates does not constitute representation that labor can be obtained by the contractor at those rates.* Accord, What-Mac Contractors, Inc., 76-2 CPD 500 (1976). Further, a contractor is still obligated to pay a minimum rate set by DOL under the SCA even though the rate is higher than that contained in a collective bargaining agreement between the contractor and his employees. [N:22]

G-X. ROLE OF OTHER CONTRIBUTING ENTITIES

A. CONGRESS

It has been noted that both the Senate and House Labor Subcommittee chairmen, particularly Representative Thompson of the House Labor Subcommittee, have fully supported the decisions, rulings and interpretations of the Department of Labor. [L:4]

B. THE OFFICE OF FEDERAL PROCUREMENT POLICY

OFPP has attempted to intercede in behalf of the contracting agencies and affect changes in SCA policies and procedures which would be beneficial dollar-wise and administration-wise to Federal procurement of services. The attempts of two administrators (Mr. Hugh Witt and Mr. Les Fettig) to overrule the Secretary of DOL, and effect such changes have been met with strong resistance. [L:4]

The AFL-CIO Building and Construction Trades Department maintains that there is nothing in the Office of Federal Procurement Policy Act or its legislative history to support OFPP's position that its authority under the Act is so broad as to include the power to override the Labor Department's interpretation of the requirements of the Service Contract Act.

The Justice Department ruled narrowly in favor of the Labor Department in its dispute with OFPP on who has the authority to interpret the wage rate laws--who may decide whether a federal contract falls under the Service Contract, Walsh-Healey, or Davis-Bacon Acts.

In a letter responding to President Carter's request of October 30, 1978 for an opinion on the dispute, Attorney General Griffin B. Bell concludes that "the powers of the Administrator of OFPP were not intended to extend to the construction of the substantive provisions, including questions of coverage, of the three statutes to which you refer".

OFPP contends, on the other hand, that the laws are implemented only through the procurement process, that their substantive provisions are congressional declarations of procurement policy, that interpreting these provisions significantly affects the procurement process, and that OFPP therefore has authority to make binding interpretations of the coverage of the statutes.

"In conclusion", the Attorney General told the President, "the question whether a particular class of contracts is covered by the Walsh-Healey or Service Contract Acts is one for the decision of the Secretary of Labor. In making that decision, the Secretary must exercise discretion within the broad limits of the language of the two statutes. [P]

G-XI. CONTRACT CLAUSES AND SOLICITATION PROVISIONS

A. The following pages contain the clauses, solicitation provisions, and guidance as to their use. The pertinent clauses were obtained from the DAR and are listed as follows:

1. 7-1903.41(a) - Service Contracts in Excess of \$2,500 (Exhibit G-10)
2. 7-1903.41(b) - Service Contracts not in excess of \$2,500 (Exhibit G-11)
3. 7-1903.41(c) - Basic Ordering Agreements and Blanket Purchase Agreements (Exhibit G-12)
4. 7-1903.41(d) - Price Adjustment Clause (Exhibit G-13)
5. 7-1903.41(e) - Potential Application of the Act to Overhaul and Modification Work (Exhibit G-14)
6. 7-3003.84 - Statement of Rates for Federal Hires (Exhibit G-15)
7. 7-2003.85 - SCA Minimum Wages and Fringe Benefits Applicable to Successor Contractor Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA) (Exhibit G-16)

B. Exhibits G-17 and G-18 are examples taken from the Naval Supply Center Oakland CC&F Book 1980 Edition. The Legal Counsel maintains the clause book and sends a copy to any command who requests a copy of it. It is highly recommended that all purchasing commands obtain this useful clause book.

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7-1903.38 *Protection of Government Buildings, Equipment and Vegetation.* In accordance with 7-104 63, insert the clause therein

7-1903.39 *Insurance.* In accordance with 10 405, insert the clause in 7-104 65

7-1903.40 *Acquisition and Use of Excess and Near Excess Currency.* In accordance with 6-1110, insert the clause in 7-104 66

7-1903.41 *Service Contract Act of 1965, as Amended.*

(a) *Service Contracts in Excess of \$2,000.* The following clause shall be included in each contract in excess of \$2,000, the principal purpose of which is to furnish services in the United States (see (p)(8) of the clause below) through use of service employees and which is not otherwise exempted by the provisions of the Service Contract Act of 1965, as amended, the clause below, and Part 10 of Section XII.

SERVICE CONTRACT ACT OF 1965, AS AMENDED (1979 SEP)

This contract, to the extent that it is of the character to which the Service Contract Act of 1965, as amended (41 U.S.C. 351 et seq.) (hereafter referred to as the "Act"), applies, is subject to the following provisions of the Act and to the regulations of the Secretary of Labor thereunder (29 CFR Part 4).

(a) *Compensation.* Each service employee employed in the performance of this contract by the Contractor or any subcontractor shall be paid no less than the minimum monetary wage and shall be furnished fringe benefits determined by the Secretary of Labor or the Secretary's authorized representative, as specified in any attachment to this contract. If there is such an attachment, any class of service employees which is not listed therein, but which is to be employed under this contract, shall be classified by the Contractor so as to provide a reasonable relationship between such classifications and those listed in the attachment and shall be paid such monetary wages and furnished such fringe benefits as are determined by agreement of the interested parties, who shall be deemed to be the contracting agency, the Contractor, and the employees who will perform on the contract or their representatives. If the interested parties do not agree on a classification or reclassification which is, in fact, conformable, the Contracting Officer shall submit the question, together with recommendation, to the Administrator of the Wage and Hour Division, Employment Standards Administration, of the Department of Labor for final determination. Failure to pay such employees the compensation agreed upon by the

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interested parties or finally determined by the Administrator or the Administrator's authorized representative shall be a violation of this contract. No employee engaged in performing work on this contract shall be paid, in any event, less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended.

(b) *Obligation to Furnish Fringe Benefits.* The Contractor or subcontractor can only discharge the obligation to furnish fringe benefits specified in the attachment or conformed thereto either by (i) furnishing any equivalent combinations of fringe benefits, or (ii) making equivalent or differential payments in cash pursuant to the applicable rules set forth in subparts B and C of 29 CFR Part 4.

(c) *Adjustment of Compensation.* If, as authorized pursuant to section 4(d) of the Act, the term of this contract is more than 1 year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees shall be subject to adjustment after 1 year and no less than once every 2 years, pursuant to wage determinations to be issued by the Wage and Hour Division, Employment Standards Administration, Department of Labor, as provided in the Act.

(d) *Minimum Wage.* In the absence of a minimum wage attachment for this contract, neither the Contractor nor any subcontractor under this contract shall pay any employees performing work under this contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. Nothing in this provision shall relieve the Contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.

(e) *Successorship.* If this contract succeeds a contract subject to the Act, under which substantially the same services were furnished and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, then in the absence of a minimum wage attachment for this contract neither the Contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work less than the wages and fringe benefits provided for in such collective bargaining agreements, to which such employee would be entitled if employed under the predecessor contract, including accrued prospective wages and fringe benefits provided for under such agreement. No Contractor or subcontractor under this contract may be relieved of the

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foregoing obligation unless the limitations of 29 CFR 4.1c(b) apply or unless the Secretary of Labor or the Secretary's representative (1) determines that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arms-length negotiations, or (1i) after a hearing, as provided in 29 CFR 4.10, finds that the wages and fringe benefits provided for in such agreement are substantially at variance with those which prevail for services of a character similar in the locality.

(f) *Notification to Employees.* The Contractor and any subcontractor under this contract shall notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or shall post a notice of such wages and benefits in a prominent and accessible place at the worksite, using such poster as may be provided by the Department of Labor.

(g) *Safe and Sanitary Working Conditions.* The Contractor or subcontractor shall not permit any part of the services called for by this contract to be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the Contractor or subcontractor that are unsanitary or dangerous to the health or safety of service employees engaged to furnish these services, and the Contractor or subcontractor shall comply with the safety and health standards applied under 29 CFR Part 1925.

(h) *Records.* The Contractor and each subcontractor performing work subject to the Act shall make and maintain for 3 years from the completion of the work, records containing the information specified below for each employee subject to the Act and shall make them available for inspection and transcription by authorized representatives of the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor.

- (1) Employee's name and address.
- (2) Employee's work classification or classifications, rate or rates of monetary wages and fringe benefits provided, rates or rates of fringe benefit payments in lieu thereof, and total daily and weekly compensation.
- (3) Employee's daily and weekly hours worked.
- (4) Any deductions, rebates, or refunds from employee's total daily or weekly compensation.
- (5) A list of monetary wages and fringe benefits for those classes of service employees not included in the minimum wage attachment to this contract, but for which

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such wage rates or fringe benefits have been determined by the Administrator or the Administrator's authorized representative, pursuant to the labor standards in paragraph (a) of this clause. A copy of the report required by paragraph (m) of this clause shall be deemed to be such a list.

(i) *Withholding of Payments and Termination of Contract.* The Contracting Officer shall withhold or cause to be withheld from the Government Prime Contractor under this or any other Government contract with the Prime Contractor such sums as the Contracting Officer, or an appropriate officer of the Labor Department, decides may be necessary to pay underpaid employees. Additionally, any failure to comply with the requirements of this clause relating to the Act may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the Contractor in default with any additional cost.

(j) *Subcontractors.* The Contractor agrees to insert this clause relating to the Act in all subcontracts. The term "Contractor," as used in this clause, in any subcontract shall be deemed to refer to the subcontractor, except in the term "Government Prime Contractor."

(k) *Service Employee.* As used in this clause, relating to the Act, the term "service employee" means any person employed in connection with a contract entered into by the United States and not exempted under section 7 of the Act (41 U.S.C. 356), whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR Part 541 and in any subsequent revisions of these regulations); and shall include all such persons, regardless of any contractual relationship that may be alleged to exist between a Contractor or subcontractor and such persons.

(l) *Federal Wage Board (Blue Collar) and General Schedule (White Collar) Wages and Fringe Benefits Applicable to Service Employee Classifications.* Classes of service employees expected to be employed under this contract with the Government would be subject, if employed by the contracting agency, to the provisions of 5 U.S.C 5341 and 5332 and, if so employed, would be paid the rates of wages and fringe benefits stated in the solicitation for this contract.

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(m) *Contractor's Report.* If there is a wage determination attachment to this contract and one or more classes of service employees that are not listed thereon are to be employed under the contract, the Contractor shall report to the Contracting Officer the monetary wages to be paid and the fringe benefits to be provided each such class of service employee. This report shall be made promptly, as soon as such compensation has been determined, as provided in paragraph (a) of this clause.

(n) *Collective Bargaining Agreements Applicable to Service Employees.* If wages to be paid or fringe benefits to be furnished any service employees employed by the Government Prime Contractor or any subcontractor under the contract are provided for in a collective bargaining agreement that is or will be effective during any period in which the contract is being performed, the Government Prime Contractor shall report such fact to the Contracting Officer. The Prime Contractor also shall provide full information as to application and accrual of such wages and fringe benefits, including any prospective increases, to service employees engaged in work on the contract, and a copy of the collective bargaining agreement. Such report shall be made upon commencing performance of the contract in the case of collective bargaining agreements effective at such time, and, in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract performance, the agreements shall be reported promptly after negotiation thereof.

(o) *Regulations Incorporated by Reference.* All interpretations of the Act expressed in subpart C of 29 CFR 29 CFR Part 4 are hereby incorporated by reference in this contract.

(p) *Exemptions and Limitations.* This clause shall not apply to the following:

(1) Any contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting or decorating of public buildings or public works.

(2) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

(3) Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect, or where such carriage is subject to rates covered by section 22 of the Interstate Commerce Act;

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(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) Any contract for public utility services, including electric light and power, water, steam, and gas;

(6) Any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) Any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations;

(8) Any services to be furnished outside the United States. For geographic purposes, the "United States" is defined in section 8(d) of the Act to include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, the Outer Continental Shelf Lands, as defined in Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island. It does not include any other territory under the jurisdiction of the United States or any U.S. base or possession within a foreign country.

(9) Any of the following contracts exempted from all provisions of the Act, pursuant to section 4(b) of the Act, which exemptions the Secretary of Labor, prior to amendment of such section by Public Law 92-473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(i) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom; and

(ii) Any contract entered by the U.S. Postal Service with an individual owner-operator for mail service where it is not contemplated at the time the contract is made that such owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness or accident.

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(q) *Variations, Tolerances, and Exemptions Involving Employment.* Notwithstanding any of the provisions in paragraphs (a) through (o) of this clause relating to the Act, the following employees may be employed in accordance with the following variations, tolerances, and exemptions, which the Secretary of Labor, pursuant to section 4(b) of the Act (prior to its amendment by Public Law 92-473), found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

- (1) (i) Apprentices, student-learners, and workers whose earning capacity is impaired by age, physical or mental deficiency or injury may be employed at wages lower than the minimum wages otherwise required by section 2(a)(1) or 2(b)(1) of the Act without diminishing any fringe benefits or cash payments in lieu thereof required under section 2(a)(2) of the Act, in accordance with the procedures prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, in the regulations issued by the Administrator of the Wage and Hour Division of the Department of Labor (29 CFR Parts 520, 521, 524, and 525).
- (ii) The Administrator will issue certificates under the Act for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, authorizing appropriate rates of minimum wages (but without changing requirements concerning fringe benefits or supplementary cash payments in lieu thereof), and applying procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (29 CFR Parts 520, 521, 524, and 525).
- (iii) The Administrator will also withdraw, annul, or cancel such certificates in accordance with the regulations in 29 CFR Parts 525 and 528.
- (2) An employee engaged in an occupation in which the employee customarily and regularly receives more than \$20 a month in tips may have the amount of such tips credited

EXHIBIT G-10

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by the employer against the minimum wage required by section 2(a)(1) or section 2(b)(1) of the Act, in accordance with the regulations in 29 CFR Part 531; *provided, however,* That the amount of such credit not exceed one half of the minimum rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. Note: This paragraph may not be operable where section 4(c) of the Act applies.

(End of clause)

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(b) *Service Contracts Not in Excess of \$2,500.* Insert the following clause in every contract not in excess of \$2,500 that has as its principal purpose the furnishing of services through the use of service employees, except those transactions identified in paragraph (p) of the clause in (a) above.

SERVICE CONTRACT ACT OF 1965, AS AMENDED (1979 SEP)

Except to the extent that an exemption, variation, or tolerance would apply, pursuant to 29 CFR 4.6, if this were a contract in excess of \$2,500, the Contractor and any subcontractor hereunder shall pay all employees engaged in performing work on the contract no less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. All regulations and interpretations of the Service Contract Act of 1965, as amended, expressed in 29 CFR Part 4, are hereby incorporated by reference in this contract.

(End of clause)

EXHIBIT G-11

(c) *Basic Ordering Agreements and Blanket Purchase Agreements.* In the case of the basic ordering agreement or blanket purchase agreement, the dollar amount thereof for purposes of (a) and (b) above shall be the aggregate amount of all orders estimated to be placed thereunder for 1 year after the effective date of the agreement. If an agreement continues or is extended, such estimate shall be made annually for each year after the first, and the agreement modified accordingly.

EXHIBIT G-12

(d) Price Adjustment Clauses.

(1) In fixed price-type service contracts with options to renew and fixed price-type multiyear service contracts which contain the clause in (a) above, insert the Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiyear and Option Contracts) clause in 7-1905(b).

(2) In fixed price service contracts other than those covered by (1) above, which contain the clause in (a) above, insert the Fair Labor Standards Act and Service Contract Act—Price Adjustment clause in 7-1905(c).

EXHIBIT G-13

(e) *Potential Application Clause.* The following clause is to be included in solicitations and resulting contracts for overhaul and modification of equipment, which are considered by the contracting officer to be subject to the Walsh-Healy Public Contracts Act rather than the Service Contract Act, as amended. In paragraph (c) of the clause, "60 days" may be substituted for "30 days."

POTENTIAL APPLICATION OF THE SERVICE CONTRACT ACT, AS AMENDED (FIXED PRICE) (1979 SEP)

(a) The Contractor warrants that the prices set forth in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(b) In the event that during the performance of this contract, it is determined by appropriate authority that the provisions of the Service Contract Act of 1965, as amended, apply to any of the work covered by this contract, the Contracting Officer may unilaterally implement such determination by requiring payment of the appropriate wage and fringe benefit scale, and the Contractor agrees to comply with such implementation. In the event that compliance with the Contracting Officer's direction results in any increase in the labor rates paid under this contract, the Contractor agrees to enter promptly into negotiations to reflect such an increase. Such contract adjustment shall be limited to increases in wages or fringe benefits affected by the above determination, and the concomitant increases in social security and unemployment taxes and workmen's compensation insurance, but shall not otherwise include any amount for profit, or for general administrative costs or overhead.

(c) Within 30 days of receipt of the applicable wage and fringe benefit scale, the Contractor will submit a proposal for any contract price change to the Contracting Officer. With the submission of his proposal for adjustment, the Contractor shall also submit, if requested by the Government, all necessary and pertinent data used by him in preparing the proposal upon which he received the original award of this contract. The Contracting Officer or his authorized representative shall have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor until the expiration of 3 years after final payment under this contract.

(d) This clause shall be deemed to constitute the exclusive contractual remedy of the Contractor for adjustment arising out of the decision to apply the Service Contract Act, as amended, to the work covered by this contract. Failure of the parties to reach an understanding as to such adjustment shall be considered a dispute subject to the Disputes clause of the contract.

EXHIBIT G-14

(End of clause)

7-2003.84 *Statement of Equivalent Rates for Federal Hires.*
In accordance with 12-1005.2(b)(3), insert the following provision in all solicitations for the acquisition of services to which the clause at 7-1903.41(a) applies:

RATES FOR EQUIVALENT FEDERAL HIRES (1979 SEP)

In compliance with the Service Contract Act of 1965, as amended, and the regulations of the Secretary of Labor (29 CFR Part 4), this solicitation incorporates a statement of Federal employee classes, incorporating wages paid and fringe benefits provided to each class. These Federal classes are comparable to the service employee classes expected to be employed under the contract resulting from this acquisition. (THE STATEMENT IS FOR INFORMATION ONLY).

(End of provision)

EXHIBIT G-15

7-2003.85 SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA). In accordance with 12-1005.2(b)(5), insert the following provision in all solicitations for the acquisition of services to which—

- (i) the clause at 7-1903.41(a) applies;
- (ii) the contract resulting from this solicitation succeeds an ongoing contract for substantially the same services;
- (iii) the incumbent contractor has negotiated or is negotiating a CBA with some or all of its service employees; and
- (iv) all applicable Department of Labor wage determinations have been requested but not received.

SERVICE CONTRACT ACT (SCA) MINIMUM WAGES AND FRINGE BENEFITS (1979 SEP)

An SCA wage determination applicable to this work has been requested from the U.S. Department of Labor. If an SCA wage determination is not incorporated herein, the bidders/offers shall consider the economic terms of the collective bargaining agreement (CBA) between the incumbent contractor _____ and the _____ (union). Copies of the agreement can be obtained from the contracting officer. Pursuant to DOL Regulation, 29 CFR 4.1c, the economic terms of that agreement (or any new CBA negotiated 10 or more days prior to the opening of bids, or the commencement of the contract in the case of negotiated contracts, exercise of options, or extensions) will apply to the contract resulting from this solicitation, notwithstanding the absence of a wage determination reflecting such terms, unless it is determined, after a hearing pursuant to section 4(c) of the SCA, that they are substantially at variance with the wages prevailing in the area.

(End of provision)

EXHIBIT G-16

H19 WAGE DETERMINATION APPLICABLE, SERVICE CONTRACT ACT

An attachment hereto sets forth the applicable Service Contract Act Wage Determination by the Secretary of Labor.

USE: In any solicitation or contract in excess of \$2,500 involving a wage determination for services defined in DAR/ASPR 12-1002.2(i) as covered by the Service Contract Act of 1965. Use with the clause in DAR/ASPR 7-1903.41(a).

REF: DAR/ASPR 2-201(a) Sec. H(v)
DAR/ASPR 3-501(b) Sec. H(viii)
DAR/ASPR 12-1005.2(b)(4)a.

- NOTE: (1) If the wage determination is received after issuance of the solicitation but 10 days or more before opening of the bids or the receipt of initial proposals, the H110 clause and applicable wage determination must be added by amending the solicitation; they may be added later than 10 days before the opening of bids or receipt of initial proposals if the Contracting Officer finds there is a reasonable time in which to notify the offerors/bidders of the revision.
- (2) "Locality" as used in the Act means "place of performance" according to Descomp Inc. v. Sampson (DC Dec. 1974) 377 F. Supp. 254, at pp. 265, 266.
- (3) Where work is to be performed at several localities the solicitation shall identify which wage determinations apply to each. DAR/ASPR 12-1005.2(b)(1)c. See Midwest Maintenance & Construction Co., Inc. v. Xavier M. Vela (CA 10, No. 78-1694, 1 May 1980) (832 FCR A-3)

SERVICE CONTRACT ACT (SCA) MINIMUM WAGES AND
FRINGE BENEFITS (1979 SEP)

An SCA wage determination applicable to this work has been requested from the U.S. Department of Labor. If an SCA wage determination is not incorporated herein, the bidders/offers shall consider the economic terms of the collective bargaining agreement (CBA) between the incumbent contractor _____ and the _____ (union). Copies of the agreement can be obtained from the contracting officer. Pursuant to DOL Regulation, 29 CFR 4.1c, the economic terms of that agreement (or any new CBA negotiated 10 or more days prior to the opening of bids, or the commencement of the contract in the case of negotiated contracts, exercise of options, or extensions) will apply to the contract resulting from this solicitation, notwithstanding the absence of a wage determination reflecting such terms, unless it is SCA, that they are substantially at variance with the wages prevailing in the area.

USE: In all service contracts to which--

- (i) the clause at 7-1903.41(a) applies;
- (ii) the contract resulting from this solicitation succeeds an ongoing contract for substantially the same services;
- (iii) the incumbent contractor has negotiated or is negotiating a CBA with some or all of its service employees; and
- (iv) all applicable Department of Labor wage determinations have been requested but not received.

REF: DAR/ASPR 2-201(a) Sec. H(v)
DAR/ASPR 3-501(b) Sec. H(viii)
DAR/ASPR 7-2003.85
DAR/ASPR 12-1005.2(b)(5)

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G-XII. DOL'S PROPOSED REVISIONS OF 28 DECEMBER 1980

In the Federal Register of 28 December 1979, DOL issued major complete revisions to its regulations, rulings and interpretations at 29 CFR Part 4 for the intended purpose of (1) assisting the procurement process and (2) codifying a number of DOL policies, procedures, interpretations and determinations made over the past years and which are now standard operating procedures. The Department of Defense (OUSD RE(AP)) by letter of 25 Mar 80 covering SCA, EEO and Davis-Bacon Act revisions has advised DOL that these revisions will place:

"...yet more burdensome and costly requirements on contracting procedures; and for the first time codify many of those policies to which we have objected. Such policies seriously hamper our ability to contract, and significantly inflate our costs."... "We believe both your current policies and those proposed are contrary to the administration's expressed desires to reduce government paperwork, spending and regulatory requirements ... we strongly object to the proposed regulations. We urge that the Department of Labor give serious consideration to our concerns which have been articulated on several occasions through the Office of Federal Procurement Policy. We request, ... in the absence of significant changes ..., an opportunity be given to all interested parties to present their views in public and open hearing."

It is understood that all contracting agencies providing comments to DOL made strong objections to the proposed revisions. [L:8]

SERVICE CONTRACT ACT OF 1965 AS AMENDED

Act of October 22, 1965 (H.R. 10238), Public Law 89-286 (41 U.S. Code 351 et seq.), effective January 20, 1966, amended by P. L. 92-473, October 9, 1972; P. L. 93-55, July 6, 1973; P. L. 94-273, April 21, 1976, and last amended by P. L. 94-489, October 13, 1976.

AN ACT to provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That this act may be cited as the "Service Contract Act of 1965".

Sec. 2 (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$2,500, except as provided in section 7 of this Act, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local

APPENDIX G-1

law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combination of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this Act will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of title 5, United States Code, were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1050; 29 U.S.C. 201, et seq.)

(2) The provisions of sections 3, 4, and 5 of this Act shall be applicable to violations of this subsection.

Sec. 3 (a) Any violation of any of the contract stipulations required by section 2(a)(1) or (2) or of section 2(b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

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(b) In accordance with regulations prescribed pursuant to section 4 of this Act, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

Sec. 4 (a) Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2038), as amended, shall govern the Secretary's authority to enforce this Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (other than section 10), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this Act applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 2 of this Act no less often than once every two years during the term of the contract, covering the various classes of service employees.

Sec. 5 (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms

APPENDIX G-1

that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms.

Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this Act, forward to the comptroller General the name of the individual or firm found to have violated the provisions of this Act.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this act the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

Sec. 6 In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) thereof.

Sec. 7. This Act shall not apply to --

(1) Any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

(3) Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

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(5) Any contract for public utility services, including electric light and power, water, steam, and gas;

(6) Any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) Any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.

Sec. 8 For the purposes of this Act --

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976 and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 2 of this Act.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base of possession within a foreign country.

Sec. 9 This Act shall apply to all contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after ninety days from the date of enactment of this Act.

Sec. 10 It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 2 should be made with respect to all contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this Act which are entered into during the applicable fiscal year:

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(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) On or after July 1, 1976, all contracts under which more than five service employees are to be employed.

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Regulations, Part 4: Labor Standards for Federal Service Contracts

Title 29
Subtitle A Part 4 of the
Code of Federal Regulations

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

WH Publication 1267
(Revised September 1978)

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Title 29—LABOR

Subtitle A—Office of the Secretary of Labor

PART 4 (29 CFR)—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

Subpart A—Service Contract Labor Standards Provisions and Procedures

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4.1b Definitions and use of terms.
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AUTHORITY: Secs. 2(a) and 4, 79 Stat. 1034, 1035, 41 U.S.C. 351, 353, and under 5 U.S.C. 301.

SOURCE: The provisions of this Part 4 appear at 33 FR 9880, July 10, 1968, unless otherwise noted.

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SUBPART A—SERVICE CONTRACT LABOR STANDARDS PROVISIONS AND PROCEDURES

Section 4.1 Purpose and scope

This part and Part 1925 of this title, which provides safety and health standards, contain the Department of Labor's rules relating to the administration of the McNamara-O'Hara Service Contract Act of 1965, referred to hereinafter as the Act. Rules of practice for administrative proceedings enforcing labor standards in Federal service contracts are contained in Part 6 of this chapter.

[33 FR 9880, July 10, 1968, as amended at 43 FR 28467, June 30, 1978]

Section 4.1a The Act as amended

(a) The provisions of the Act (see sections 4.102-4.103) were amended, effective October 9, 1972, by Public Law 92-473, signed into law by the President on that date. By virtue of amendments made to paragraphs (1) and (2) of section 2(a) and the addition to section 4 of a new subsection (c), the compensation standards of the Act (see sections 4.159-4.164) were revised to impose on successor contractors certain requirements (see section 4.1c) with respect to payment of wage rates and fringe benefits based on those agreed upon for substantially the same services for the same location in collective bargaining agreements entered into by their predecessor contractors (unless such agreed compensation is substantially at variance with that locally prevailing or the agreement was not negotiated at arm's length), and to require the Secretary of Labor to give effect to the provisions of such collective bargaining agreements in his wage determinations under section 2 of the Act. A new paragraph (5) added to section 2(a) of the Act requires a statement in the government service contract of the rates that would be paid by the contracting agency in the event of its direct employment of those classes of service employees to be employed on the contract work who, if directly employed by the agency, would receive wages determined as provided in 5 U.S.C. 5341. The Secretary of Labor is directed to give

due consideration to such rates in determining minimum monetary wages and fringe benefits under the Act's provisions. Other provisions of the 1972 amendments include the addition of a new section 10 to the Act to insure extension of coverage by wage determinations of the Secretary to substantially all service contracts subject to section 2(a) of the Act at the earliest administratively feasible time; an amendment to section 4(b) of the Act to provide, in addition to the conditions previously specified for issuance of administrative limitations, variations, tolerances, and exemptions (see section 4.123), that administrative action in this regard shall be taken only in special circumstances where the Secretary determines that it is in accord with the remedial purpose of the Act to protect prevailing labor standards; and a new subsection (d) added to section 4 of the Act providing for the award of service contracts for terms not more than 5 years with provision for periodic adjustment of minimum wage rates and fringe benefits payable thereunder by the issuance of wage determinations by the Secretary of Labor during the term of the contract. A further amendment to section 5(a) of the Act requires the names of contractors found to have violated the Act to be submitted for the debarment list (see section 4.188) not later than 90 days after the hearing examiner's finding of violation unless the Secretary recommends relief, and provides that such recommendations shall be made only because of unusual circumstances.

(b) The provisions of the Act were amended by Pub. L. 93-57, 87 Stat. 140, effective July 6, 1973, to extend the Act's coverage to Canton Island.

(c) The provisions of the Act were amended by Pub. L. 94-489, 90 Stat. 2358, approved October 13, 1976, to extend the Act's coverage to white collar workers. Accordingly, the minimum wage protection of the Act now extends to all workers, both blue collar and white collar, other than persons employed in a bona fide executive, administrative, or professional capacity as those terms are used in the Fair Labor Standards Act and in Part 541 of Title 29.

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Pub. L. 94-489 accomplished this change by adding to section 2(a)(5) of the Act a reference to 5 U.S.C. 5332, which deals with white collar workers, and by amending the definition of service contract employee in section 8(b) of the Act.

(d) Included in this Subpart A and in Part 6 of this subtitle are provisions to give effect to the amendments mentioned in this section. Until editorial revisions of other provisions of this part can be made to conform to the Act as amended, such provisions should be read in conjunction with the statutory amendments referred to in this section.

[37 FR 25468, Nov. 30, 1972, as amended at 42 FR 43064, Aug. 26, 1977]

Section 4.1b Definitions and use of terms

(a) As used in this part, unless otherwise indicated by the context—

(1) "Secretary" includes the Secretary of Labor, the Assistant Secretary of Labor for Employment Standards, and their authorized representatives.

(2) "Administrator" means the Administrator of the Wage and Hour Division, or his authorized representative as set forth in this part. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division is designated to act for him under this part. Except as otherwise provided in this part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator for the performance of functions relating to the making and effectuation of wage determinations under the Service Contract Act of 1965, as amended, and this part.

(3) "Office of Government Contract Wage Standards" or "OGCWS" means the organizational unit in the Wage and Hour Division, Employment Standards Administration, to which is assigned the performance of functions of the Secretary under the Service Contract Act of 1965 as amended.

(4) "Contract" includes any contract subject wholly or in part to provisions of the Service Contract Act of 1965 as amended and any

contract of any tier thereunder. (See sections 4.107-4.134.)

(5) "Contractor" includes a subcontractor whose subcontract is subject to provisions of the Act.

(6) "Wage determination" includes any determination of minimum wage rates or fringe benefits made pursuant to the provisions of section 2(a) of the Act for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of \$2,500 which is subject to the provisions of the Service Contract Act of 1965.

(7) "Act," "Service Contract Act," or "Service Contract Act of 1965" shall mean the Service Contract Act of 1965 as amended, by Public Law 92-473, 86 Stat. 789, enacted and effective October 9, 1972, Pub. L. 93-57, 87 Stat. 140, effective July 6, 1973, and Pub. L. 94-489, 90 Stat. 2358, effective October 13, 1976.

[37 FR 25468, Nov. 30, 1972, as amended at 42 FR 43064, Aug. 26, 1977; 43 FR 28467, June 30, 1978]

Section 4.1c Payment of minimum compensation based on collectively bargained wage rates and fringe benefits applicable to employment under predecessor contract

(a) Section 4(c) of the Service Contract Act of 1965 as amended provides special minimum wage and fringe benefit requirements applicable to every contractor and subcontractor under a contract which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished for the same location. Section 4(c) provides that no such contractor or subcontractor shall pay any employee employed on the contract work less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in such collective bargaining agreement. If, however, the Secretary finds after a hearing in

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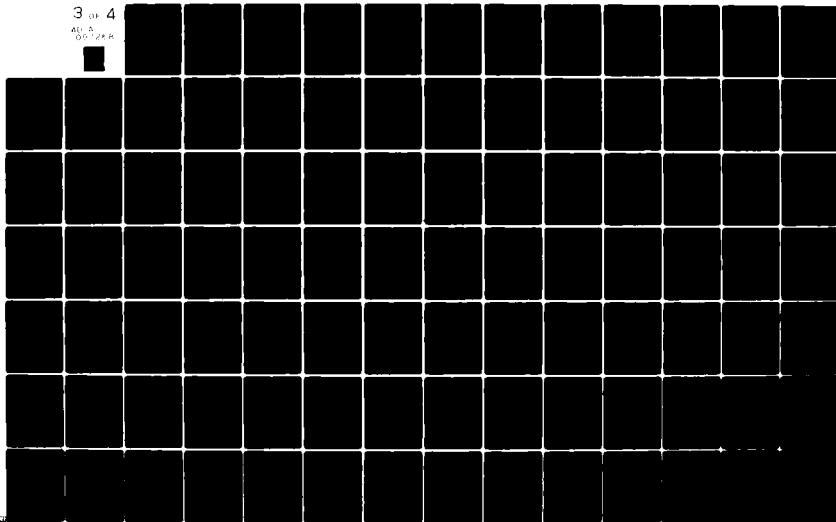
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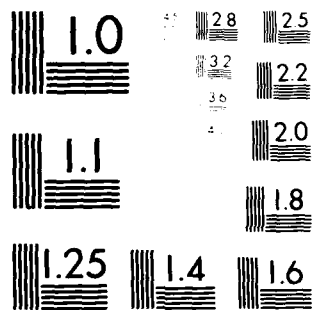
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accordance with the regulations set forth in section 4.10 of this subpart that in any of the foregoing circumstances such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality, the payment obligations of such contractor or subcontractor with respect thereto shall not apply in such circumstances.

(b) Pursuant to section 4(b) of the Act, the application of section 4(c) is made subject to the following variation in the circumstances and under the conditions described: The wage rates and fringe benefits provided for in any collective bargaining agreement applicable to the performance of work under the predecessor contract which is consummated during the period of performance of such contract shall not be effective for purposes of the successor contract under the provisions of section 4(c) of the Act or under any wage determination implementing such section issued pursuant to section 2(a) of the Act, if—

(1) in the case of a successor contract for which bids have been invited by formal advertising notice of the terms of such new or changed collective bargaining agreement is received by the contracting agency less than 10 days before the date set for opening of bids, or

(2) in the case of a successor contract to be entered into pursuant to negotiations, or in the case of the execution of an option or an extension of the initial contract term, such notice of the terms of such new or changed collective bargaining agreement is received by the agency less than 10 days before commencement of the contract;

(3) if under either paragraph (b)(1) or (2) of this section the contracting agency finds that there is not reasonable time still available to notify bidders or to incorporate the newly bargained wage rates and fringe benefits in the successor contract, as the case may be; and

(4) The 10 day limitation in paragraph (b)(1) or (2) of this section shall apply only if the contracting officer has given both the incumbent (predecessor) contractor and his employees' collective bargaining representative notification at least 30 days in advance of any estimated procurement date, such as issue of bid solicitation, bid opening, date of award, or the commencement date of a contract resulting from a

negotiation, option, or extension, as the case may be.

[37 FR 25468, Nov. 30, 1972, as amended at 41 FR 5388, Feb. 6, 1976]

Section 4.2 Payment of minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 under all service contracts

Section 2(b)(1) of the Service Contract Act of 1965 provides in effect that, regardless of contract amount, no contractor or subcontractor performing work under any Federal contract the principal purpose of which is to furnish services through the use of service employees shall pay any of his employees engaged in such work less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (\$2.65 per hour beginning January 1, 1978, \$2.90 per hour beginning January 1, 1979, \$3.10 per hour beginning January 1, 1980, and \$3.35 per hour after December 31, 1980).

[43 FR 1491, January 10, 1978]

Section 4.3 Register of wage determinations

(a) The minimum monetary wages and fringe benefits for service employees which the Act requires to be specified in contracts and bid specifications subject to section 2(a) thereof will be set forth in wage determinations issued by the Administrator as an orderly series constituting a register of such minimum wages and fringe benefits. The register shall include, as soon as administratively feasible, wage determinations applicable to all contracts subject to section 2(a) of the Act, and will include in any event, for the localities in which services under such contracts are to be furnished, wage determinations applicable to all contracts entered into during the following years under which more than the stated number of service employees are to be employed: (1) Fiscal year ending June 30, 1973—25; (2) ending June 30, 1974—20; (3) ending June 30, 1975—15; (4) ending June 30, 1976—10; (5) ending June 30, 1977, and for each fiscal year thereafter—5.

(b) Such wage determinations will set forth for the various classes of service employees to be

employed in furnishing services under such contracts in the several localities, minimum monetary wage rates to be paid and minimum fringe benefits to be furnished them during the periods when they are engaged in the performance of such contracts, including, where appropriate under the Act, provisions for adjustments in such minimum rates and benefits to be placed in effect under such contracts at specified future times. The wage rates and fringe benefits set forth in such wage determinations shall be determined in accordance with the provisions of sections 2(a) (1), (2), and (5), 4(c) and 4(d) of the Act from those prevailing in the locality for such employees and from pertinent collective bargaining agreements, with due consideration of the rates that would be paid for direct Federal employment of any classes of such employees whose wages, if federally employed, would be determined as provided in 5 U.S.C. 5341 or 5 U.S.C. 5332. Unless otherwise specified in the wage determination, the wage rates and fringe benefits so determined for any class of service employees to be engaged in furnishing covered contract services in a locality shall be made applicable by contract to all service employees of such class employed to perform such services in the locality under any contract subject to section 2(a) of the Act which is entered into thereafter and before such determination has been rendered obsolete by a withdrawal, modification, or supersedure.

(c) Wage determinations included in the register will be available for public inspection during business hours at the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and copies will be made available on request at Regional Offices of the Wage and Hour Division.

[37 FR 25469, November 30, 1972, as amended at 42 FR 43064, Aug. 26, 1977; 43 FR 28467, June 30, 1978]

Section 4.4 Notice of intention to make a service contract

(a) Not less than 30 days prior to any invitation for bids, request for proposals, or commencement of negotiations for any contract exceeding \$2,500 which may be subject to the

Act, the contracting agency shall file with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. Such notice shall be submitted on Standard Form 98, Notice of Intention to Make a Service Contract, which shall be completed in accordance with the instructions provided and shall be supplemented by the information required under paragraphs (b) and (c) of this section. Supplies of Standard Form 98 are available in all GSA supply depots under stock number 7540-926-8972.

(b) The contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) a statement in writing containing the following information concerning the service employees expected by the agency to be employed by the contractor and any subcontractors in performing the contract:

(1) The number of such employees of all classes, or a statement indicating whether such number will or will not exceed the number for which a wage determination is mandatory under the provisions of section 4.3(a); and

(2) A listing of those classes of service employees expected to be employed under the contract which, if employed by the agency, would be subject to the wage provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332, together with a specification of the rates of wages and fringe benefits that would be paid by the Government to employees of each such class if such statute were applicable to them. (Under section 2(a)(5) of the Act and section 4.6 the inclusion of such a statement in the service contract is also required.)

(c) If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits

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currently or prospectively payable under such agreement. If such services are being furnished for more than one location and the collectively bargained wage rates and fringe benefits are different for different locations or do not apply for one or more locations, the agency shall identify the locations to which such agreements have application. In the event that the agency has reason to believe that any such collective bargaining agreement was not entered into as a result of arms-length negotiations, a full statement of the facts so indicating shall be transmitted with the copy of such agreement. If the agency has information indicating that any such collectively bargained wage rates and fringe benefits are substantially at variance with those prevailing for services of a similar character in the locality, the agency shall so advise the Office of Government Contract Wage Standards and, if it believes a hearing thereon pursuant to section 4(c) of the Act is warranted, shall file its request for such hearing pursuant to section 4.10 of this part at the time of filing the Notice of Intention to Make a Service Contract (Form SF-98).

(d) Any Standard Form 98 submitted by a contracting agency without the information required under paragraphs (b) and (c) of this section will be returned to the agency for further action.

(e) If exceptional circumstances prevent the filing of the notice of intention and supplemental information required by this section on a date at least 30 days prior to any invitation for bids, request for proposals, or commencement of negotiations for a proposed contract subject to section 2(a) of the Act, the notice shall be submitted to the Office of Government Contract Wage Standards as soon as practicable with a detailed explanation of the special circumstances which prevented timely submission.

[37 FR 25469, Nov. 30, 1972, as amended at 42 FR 43064, Aug. 26, 1977; 43 FR 28467, June 30, 1978]

Section 4.5 Contract specification of determined minimum wages and fringe benefits

(a) Any contract agreed upon in excess of \$2,500 shall contain an attachment specifying the minimum wages and fringe benefits for service employees to be employed thereunder, as

determined in any applicable currently effective wage determination made and included in the register as provided in section 4.3, including any expressed in any document referred to in subparagraph (1) or (2) of this paragraph:

(1) Any communication from the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, responsive to the notice required by section 4.4; or

(2) Any revision of the register by a wage determination issued prior to the award of the contract or contracts which specifies minimum wage rates or fringe benefits for classes of service employees whose wages or fringe benefits were not previously covered by wage determinations in the register, or which changes previously determined minimum wage rates and fringe benefits for service employees employed on covered contracts in the locality. However, revisions received by the Federal agency later than 10 days before the opening of bids, in the case of contracts entered into pursuant to competitive bidding procedures, shall not be effective if the Federal agency finds that there is not a reasonable time still available to notify bidders of the revision. In situations under section 4(c) of the Act, the provisions in section 4.1c(b) apply.

(b)(1) The following exemptions from the compensation requirements of section 2(a) of the Act apply, subject to the limitations set forth in subparagraphs (2), (3) and (4) of this paragraph: To avoid serious impairment of the conduct of Government business it has been found necessary and proper to provide exemption (i) from the determined wage and fringe benefits section of the Act (section 2(a) (1), (2)) but not the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (section 2(b) of this Act), of all contracts for which no such wage or fringe benefit has been determined for any class of service employees to be employed thereunder; and (ii) from the fringe benefits section (section 2(a) (2)) of all contracts and of all classes of service employees employed thereunder if no such benefits have been determined for any such class of service employees.

(2) The exemptions provided in subparagraph (1) of this paragraph, which were adopted

pursuant to section 4(b) of the Act prior to its amendment by Public Law 92-473, do not extend to undetermined wages or fringe benefits in contracts for which one or more, but not all, classes of service employees are the subject of an applicable wage determination. The procedure for determination of wage rates and fringe benefits for any classes of service employees engaged in performing such contracts whose wages and fringe benefits are not specified in a wage determination included in the register is set forth in section 4.6(b).

(3) The exemptions provided in subparagraph (1) of this paragraph do not apply to any contract for which section 10 of the Act as amended and section 4.3 of this part require an applicable wage determination.

(4) The exemptions provided in subparagraph (1) of this paragraph do not exempt any contract from the application of the provisions of section 4(c) of the Act as amended.

(c) If the notice of intention required by section 4.4 is not filed with the required supporting documents within the time provided in such section, the contracting agency shall exercise any and all of its power that may be needed (including, where necessary, its power to negotiate, its power to pay any necessary additional costs, and its power under any provision of the contract authorizing changes) to include in the contract any wage determinations communicated to it within 30 days of the filing of such notice or of the discovery by the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, of such omission.

[37 FR 25469, Nov. 30, 1972, as amended at 41 FR 5388, Feb. 6, 1976; 43 FR 28467, June 30, 1978]

Section 4.6 Labor standards clauses for Federal service contracts exceeding \$2,500

The clauses set forth in the following paragraphs shall be included in every contract (and any bid specification therefor) entered into by the United States or the District of Columbia, in excess of \$2,500, the principal purpose of which is to furnish services through the use of service employees:

(a) Service Contract Act of 1965: This con-

tract, to the extent that it is of the character to which the Service Contract Act of 1965, as amended (41 U.S.C. 351) applies, is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor thereunder (this Part 4).

(b) (1) Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wage and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or his authorized representative, as specified in any attachment to this contract.

(2) If there is such an attachment, any class of service employees which is not listed therein, but which is to be employed under this contract, shall be classified by the contractor so as to provide a reasonable relationship between such classifications and those listed in the attachment, and shall be paid such monetary wages and furnished such fringe benefits as are determined by agreement of the interested parties, who shall be deemed to be the contracting agency, the contractor, and the employees who will perform on the contract or their representatives. If the interested parties do not agree on a classification or reclassification which is, in fact, conformable, the contracting officer shall submit the question, together with his recommendation, to the Office of Government Contract Wage Standards, Wage and Hour Division, ESA, of the Department of Labor for final determination. Failure to pay such employees the compensation agreed upon by the interested parties or finally determined by the Administrator or his authorized representative shall be a violation of this contract. No employee engaged in performing work on this contract shall in any event be paid less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended.

(3) If, as authorized pursuant to section 4(d) of the Service Contract Act of 1965 as amended, the term of this contract is more than 1 year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees shall be subject to adjustment after 1 year and not less often than once every 2 years, pursuant to wage determinations

to be issued by the Wage and Hour Division, Employment Standards Administration of the Department of Labor as provided in such Act.

(c) The contractor or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined conformably thereto by furnishing any equivalent combinations of fringe benefits, or by making equivalent or differential payments in cash in accordance with the applicable rules set forth in Subparts B and C of this part, and not otherwise.

(d) (1) In the absence of a minimum wage attachment for this contract, neither the contractor nor any subcontractor under this contract shall pay any of his employees performing work under the contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a) (1) of the Fair Labor Standards Act of 1938. Nothing in this provision shall relieve the contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.

(2) If this contract succeeds a contract, subject to the Service Contract Act of 1965 as amended, under which substantially the same services were furnished and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, then in the absence of a minimum wage attachment for this contract neither the contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work less than the wages and fringe benefits, provided for in such collective bargaining agreements, to which such employee would be entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement. No contractor or subcontractor under this contract may be relieved of the foregoing obligation unless the limitations of section 4.1c(b) apply or unless the Secretary of Labor or his authorized representative determines that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arms-length negotiations, or finds, after a hearing as provided in Labor Department regula-

tions, 29 CFR 4.10 that the wages and fringe benefits provided for in such agreement are substantially at variance with those which prevail for services of a character similar in the locality.

(e) The contractor and any subcontractor under this contract shall notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or shall post a notice of such wages and benefits in a prominent and accessible place at the worksite, using such poster as may be provided by the Department of Labor.

(f) The contractor or subcontractor shall not permit any part of the services called for by this contract to be performed in buildings or surroundings or under working condition provided by or under the control or supervision of the contractor or subcontractor which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish these services, and the contractor or subcontractor shall comply with the safety and health standards applied under Part 1925 of this title.

(g) The contractor and each subcontractor performing work subject to the Act shall make and maintain for 3 years from the completion of the work records containing the information specified in subparagraphs (1) through (5) of this paragraph for each employee subject to the Act and shall make them available for inspection and transcription by authorized representatives of the Wage and Hour Division, Employment Standards Administration of the U.S. Department of Labor.

(1) His name and address.

(2) His work classification or classifications, rate or rates of monetary wages and fringe benefits provided, rate or rates of fringe benefit payment in lieu thereof, and total daily and weekly compensation.

(3) His daily and weekly hours so worked.

(4) Any deductions, rebates, or refunds from his total daily or weekly compensation.

(5) A list of monetary wages and fringe benefits for those classes of service employees not included in the minimum wage attachment to this contract, but for which such wage rates or fringe benefits have been determined by the

interested parties or by the Administrator or his authorized representative pursuant to the labor standards clause in paragraph (b) of this section. A copy of the report required by the clause in paragraph (k) (1) of this section shall be deemed to be such a list.

(h) The contracting officer shall withhold or cause to be withheld from the Government prime contractor under this or any other Government contract with the prime contractor such sums as he, or an appropriate officer of the Labor Department, decides may be necessary to pay underpaid employees. Additionally, any failure to comply with the requirements of these clauses relating to the Service Contract Act of 1965 may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(i) The contractor agrees to insert these clauses relating to the Service Contract Act of 1965 in all subcontracts. The term "contractor" as used in these clauses in any subcontract, shall be deemed to refer to the subcontractor, except in the term "Government Prime Contractor."

(j) (1) As used in these clauses relating to the Service Contract Act of 1965, as amended, the term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under Section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Part 541 of Title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(2) The following classes of service employees expected to be employed under the contract with the Government would be subject, if employed by the contracting agency, to the provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332 and would, if so employed, be paid not less than the following rates of wages and fringe benefits:

<i>Employee class</i>	<i>Monetary wage fringe benefits</i>
_____	_____
_____	_____
_____	_____

(k) (1) If there is a wage determination attachment to this contract and one or more classes of service employees which are not listed thereon are to be employed under the contract, the contractor shall report to the contracting officer the monetary wages to be paid and the fringe benefits to be provided each such class of service employee. Such report shall be made promptly as soon as such compensation has been determined as provided in the clause in paragraph (b) of this section.

(2) If wages to be paid or fringe benefits to be furnished any service employees employed by the Government prime contractor or any subcontractor under the contract are provided for in a collective bargaining agreement which is or will be effective during any period in which the contract is being performed, the Government prime contractor shall report such fact to the contracting officer, together with full information as to the application and accrual of such wages and fringe benefits, including any prospective increases, to service employees engaged in work on the contract, and a copy of the collective bargaining agreement. Such report shall be made upon commencing performance of the contract, in the case of collective bargaining agreements effective at such time, and in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract performance, such agreements shall be reported promptly after negotiation thereof.

(l) All interpretations of the Service Contract Act of 1965 expressed in Subpart C of this part, are hereby incorporated by reference in this contract.

(m) These clauses relating to the Service Contract Act of 1965 shall not apply to the following:

(1) Any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

(3) Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect, or where such carriage is subject to rates covered by section 22 of the Interstate Commerce Act;

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) Any contract for public utility services, including electric light and power, water, steam, and gas;

(6) Any employment contract providing for direct services to a Federal agency by an individual or individuals;

(7) Any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.

(8) Any services to be furnished outside the United States. For geographic purposes, the "United States" is defined in section 8(d) of the Service Contract Act to include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island and Canton Island. It does not include any other territory under the jurisdiction of the United States or any U.S. base or possession within a foreign country.

(9) Any of the following contracts exempted from all provisions of the Service Contract Act of 1965, pursuant to section 4(b) of the Act, which exemptions the Secretary of Labor, prior to amendment of such section by Public Law 92-473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(i) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of the trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom;

(ii) Any contract entered into by the U.S. Postal Service with an individual owner-operator for mail service where it is not contemplated at the time the contract is made that such owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness or accident.

(n) Notwithstanding any of the clauses in paragraphs (b) through (l) of this section, relating to the Service Contract Act of 1965, the following employees may be employed in accordance with the following variations, tolerances, and exemptions, which the Secretary of Labor, pursuant to section 4(b) of the Act prior to its amendment by Public Law 92-473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(1) (i) Apprentices, student-learners, and workers whose earning capacity is impaired by age, physical, or mental deficiency or injury may be employed at wages lower than the minimum wages otherwise required by section 2(a) (1) or 2(b) (1) of the Service Contract Act of 1965, without diminishing any fringe benefits or cash payments in lieu thereof required under section 2(a) (2) of that Act, in accordance with the procedures prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, in the regulations issued by the Administrator (Parts 520, 521, 524, and 525 of this title).

(ii) The Administrator will issue certificates under the Service Contract Act of 1965 for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, authorizing appropriate rates of minimum wages (but without changing requirements concerning fringe benefits or supplementary cash payments in lieu thereof), applying procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (Parts 520, 521, 524, and 525 of this title).

(iii) The Administrator will also withdraw,

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annul, or cancel such certificates in accordance with the regulations in Parts 525 and 528 of Title 29 of the Code of Federal Regulations.

(2) An employee engaged in an occupation in which he customarily and regularly receives more than \$20 a month in tips (\$30 a month on and after January 1, 1978) may have the amount of his tips credited by his employer against the minimum wage required by section 2(a)(1) or section 2(b)(1) of the Act, in accordance with the regulations in Part 531 of this title: *Provided, however*, That the amount of such credit may not exceed \$1.325 per hour beginning January 1, 1978, \$1.305 per hour beginning January 1, 1979, \$1.24 per hour beginning January 1, 1980 and \$1.34 per hour after December 31, 1980. If the employer pays in full cents the \$1.325 figure must be rounded down to \$1.32 and the \$1.305 figure to \$1.30.

If the employer rounded the figures upward he would be claiming a credit of a higher percentage than is authorized by law.

[37 FR 25470, Nov. 30, 1972, as amended at 39 FR 14943, Apr. 29, 1974; 41 FR 5388, Feb. 6, 1976; 42 FR 43064, Aug. 26, 1977; 43 FR 1491, Jan. 10, 1978; 43 FR 28467, June 30, 1978]

Section 4.7 Labor standards clause for Federal service contracts not exceeding \$2,500

Every contract with the Federal Government which is not in excess of \$2,500 but has as its principal purpose the furnishing of services through the use of service employees shall contain the following clause:

Service Contract Act of 1965. Except to the extent that an exemption, variation or tolerance would apply pursuant to 29 CFR 4.6 if this were a contract in excess of \$2,500, the contractor and any subcontractor hereunder shall pay all of his employees engaged in performing work on the contract not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. All regulations and interpretations of the Service Contract Act of 1965 expressed in 29 CFR Part 4 are hereby incorporated by reference in this contract.

[37 FR 25472, Nov. 30, 1972]

Section 4.8 Notice of awards

Whenever an agency of the United States or the District of Columbia shall award a contract which may be in excess of \$2,500 subject to the Act, it shall furnish the Office of Government Contract Wage Standards, Wage and Hour Division, ESA, an original and one copy of Standard Form 99, Notice of Award of Contract. The form shall be completed as follows:

(a) Items 1 through 7 and 12 and 13: Self-explanatory;

(b) Item 8: Enter the notation "Service Contract Act of 1965;"

(c) Item 9: Leave blank;

(d) Item 10: (1) Enter the notation "Major Category," and indicate beside this entry the general service area into which the contract falls (e.g., food services, grounds maintenance, computer services, installation or facility support services, custodial-janitorial service, garbage collection, insect and rodent control, laundry and drycleaning services), and (2) enter the heading "Detailed Description," and following this entry set forth a detailed description of the services to be performed; and

(e) Item 11: Enter the dollar amount of the contract, or the estimated dollar value with the notation "estimated" (if the exact amount is not known). If neither the exact nor the estimated dollar value is known, enter "indefinite," or "not to exceed \$_____." Supplies of Standard Form 99 are available in all GSA supply depots under stock number 7540-634-4049.

[37 FR 25472, Nov. 30, 1972, as amended at 43 FR 28467, June 30, 1978]

HEARINGS PURSUANT TO SECTION 4(C) OF THE ACT

Section 4.10 Provisions for hearing

(a) *Statutory provisions.* Under section 4(c) of the Act, and under wage determinations made as provided in section 2(a)(1) and (2) of the Act, contractors and subcontractors performing certain contracts subject to the Act may be obliged to pay to service employees employed on the contract work wages and fringe benefits not less than those to which they would be entitled if

they were employed on like work under a predecessor contract for which the wages and fringe benefits of service employees were governed by a collective bargaining agreement. (See sections 4.1a, 4.1c, 4.3(b), 4.6(b), 4.6(d) (2).) Section 4(c) provides, however, that "such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality."

(b) *Prerequisites for hearing.* (1) No hearing on the issue whether monetary wage rates and fringe benefits otherwise payable to service employees by virtue of the provisions of section 4(c) of the Act are substantially at variance with those which prevail for services of a character similar in the locality will be provided unless it appears from information available to the Administrator or submitted with a request for such a hearing that evidence showing, prima facie, that such a substantial variance exists will be presented.

(2) When it appears from the information available to him or submitted with such a request that such evidence sufficient to warrant an administrative determination of the issue will be presented, the Administrator on his own motion or on application of any person affected may by order refer the issue to a hearing officer for final determination in a proceeding held as provided in this section. As provided in section 4(a) of the Act, the provisions of sections 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceeding.

(3) The Administrator shall designate as hearing officer for a proceeding under this section an administrative law judge assigned for the purpose by the Chief Administrative Law Judge of the Department.

(4) A request for a hearing under this section may be made by the contracting agency or other person affected or interested including contractors or prospective contractors and associations of contractors, representatives of employees or their unions, and other interested governmental agencies. Such a request must be submitted in writing to the Office of Government Contract Wage Standards, Wage and Hour Division, Em-

ployment Standards Administration, Department of Labor, Washington, D.C. 20210 for the attention of the Administrator, and must describe the evidence on which the applicant relies to show a substantial variance between the collectively bargained rates or fringe benefits in question and the wages and fringe benefits prevailing for services of a similar character in the locality. If the information prerequisite for hearing as described in subparagraph (1) of this paragraph is not submitted with the request, the Administrator may deny the request or request supplementary information, in his discretion. No particular form for submission of a request under this section is prescribed.

(5) Pursuant to section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) for advertised contracts, prior to ten days before the award of the contract;

(ii) for negotiated contracts and for contracts with provisions extending the initial term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

(c) *Opportunity to be heard.* (1) In any proceeding under this section opportunity to be heard will be afforded to persons who may be affected by determination of the issue, including the agency whose contract is involved, any contractor or subcontractor performing on such contract or known to be desirous of bidding thereon or performing services thereunder, any unions or other authorized representatives of service employees employed or who may be expected to be employed by such a contractor or subcontractor on the contract work, and any other known interested persons. Such opportunity will be afforded at the earliest possible time after referral to the hearing officer and the proceeding will be expedited to completion and a final determination made on the issue as soon as possible thereafter.

(2) Upon referral of the issue to the hearing officer by the Administrator, written notice shall be given to the persons who may be affected by the determination (see subparagraph (1) of this paragraph) specifying a place where and a period (not less than 5 and not more than

10 days) within which they may submit in writing any factual evidence, data, views, or arguments on the issue which they desire to have considered by the hearing officer. Such notice shall also make provision for furnishing copies of such documents to all parties and specify reasonable but expeditious time limits, not more than 10 days in the absence of exceptional circumstances, within which each of the interested persons may thereafter review and respond, if desired, in writing to any matter submitted by the others. Such notice shall, whenever practicable, be included in the Administrator's order referring the matter to the hearing officer, and if not so included shall be given by the hearing officer promptly upon his assignment to the case. The order and notice shall be served upon the persons interested by certified mail or in such other manner as will provide record proof or acknowledgment of receipt by such persons.

(3) Upon completion of the period for review and comment by interested persons on matter submitted by other interested persons the hearing officer shall forthwith review, with such assistance as may be made available by the Administrator, all material submitted and, after evaluating the same, shall make a tentative determination on the issue. Prompt notice in writing of his tentative determination shall be given to all parties who have submitted matter for consideration or have otherwise made known their interest. Such notice shall set an early date and a place at which such parties may appear before the hearing officer for resolution on an informal basis or through agreement, if possible, of any areas of conflict between them which may appear from the materials presented to the hearing officer, and for agreement, if possible, or for decision by the hearing officer as to the scope and nature of any further hearing that may be required for the presentation by any party of evidence and argument on issues that cannot be resolved by the hearing officer with agreement of the parties. Service of the notice on the parties shall be made as provided in subparagraph (2) of this paragraph. All procedure set forth in this subparagraph (3), including hearing of the parties informally pursuant to such notice, shall be completed not less than 10 days after the final date for submission of materials in writing by the parties as provided under subparagraph (2) of this paragraph.

(4) If as a result of the informal hearing provided as set forth in subparagraph (3) of this paragraph there is agreement among the parties that no further hearing is necessary to supplement the written evidence and the views and arguments that have been presented to the hearing officer the hearing officer shall forthwith render his final decision.

(5) If as a result of the informal hearing provided as set forth in subparagraph (3) of this paragraph a further hearing, limited to matters remaining in controversy among the parties or to the presentation of other evidence deemed necessary by parties to a fair hearing of their contentions, is ordered by the hearing officer, he shall set a place and an early time therefor, not later than 5 days after the date of such informal hearing, and, after consultation with the parties, set reasonable guidelines and limitations for the presentations to be made at the hearing which will serve to expedite the proceeding to the extent possible consistent with adequate opportunity for the parties to be heard. At any such hearing there shall be a minimum of formality in the proceeding consistent with orderly procedure. The hearing officer may, to the extent appropriate, conduct the hearing in accordance with procedures prescribed in Part 6 of this Subtitle A, and may exercise the powers of a hearing officer as set forth therein. If oral testimony is presented, it shall be stenographically reported and a transcript thereof filed, together with all written materials submitted and orders and notices issued in the proceeding (with evidence of service thereof), in a case file which shall constitute the hearing record. The hearing officer shall promptly and not more than 5 days after completion of the hearing under this paragraph, render his decision.

(d) *Decision of hearing officer.* The hearing officer shall render a decision as provided in paragraph (c) (4) or (5) of this section based on findings of fact set forth in the decision, which shall have the finality accorded to a decision of the Secretary under the provisions of 41 U.S.C. 39. Such decision shall be filed with the case record and copies shall be transmitted promptly to the parties and to the Administrator, who shall cause to be issued any necessary wage determinations in conformance thereto.

[37 FR 25472, Nov. 30, 1972, as amended at 41 FR 5388, Feb. 6, 1976; 43 FR 28467, June 30, 1978]

SUBPART B—EQUIVALENTS OF DETERMINED FRINGE BENEFITS

Section 4.51 Discharging fringe benefit obligations by equivalent methods

Section 2(a)(2) of the Act, which provides for fringe benefits that are separate from and additional to the monetary compensation required under section 2(a)(1), permits an employer to discharge his obligation to provide the specified fringe benefits by furnishing any equivalent combinations of "bona fide" fringe benefits or by making equivalent or differential payments in cash. However, credit for such payments is limited to the employer's fringe benefit obligations under section 2(a)(2), since the Act does not authorize any part of the monetary wage required by section 2(a)(1) and specified in the wage determination and the contract, to be offset by the fringe benefit payments or equivalents which are furnished or paid pursuant to section 2(a)(2).

Section 4.52 Equivalent fringe benefits

Under this Act, fringe benefit obligations may be discharged by furnishing, in lieu of those fringe benefits determined by the Secretary and specified in the contract, other bona fide fringe benefits when the contractor or subcontractor is not required by statute to provide, or any combination of such bona fide fringe benefits: *Provided*, That they are "equivalent" in terms of monetary cost to the employer. Thus, if an applicable determination specifies that 10 cents per hour is to be paid into a pension fund, this fringe benefit obligation will be deemed to be met if instead, hospitalization benefits costing not less than 10 cents per hour are provided. The same obligation will be met if hospitalization benefits costing 5 cents an hour and holiday pay equal to 5 cents an hour in cash are provided. No benefit required to be furnished the employee by any other law, such as workers' compensation, may be credited toward satisfying the fringe benefit requirements of the Act.

[33 FR 9880, July 10, 1968, as amended at 43 FR 28467, June 30, 1978]

Section 4.53 Cash equivalents

(a) Fringe benefit obligations may be discharged by paying, in addition to the monetary wage required, a cash amount per hour in lieu of the specified fringe benefits provided such amount is equivalent to the cost of the fringe benefits required. If, for example, an employee's monetary rate under an applicable determination is \$3.50 an hour, and the fringe benefits to be furnished are hospitalization benefits costing 10 cents an hour and retirement benefits costing 10 cents an hour, the fringe benefit obligation is discharged if instead of furnishing the required fringe benefits the employer pays the employee, in cash, 20 cents per hour as the cash equivalent of the fringe benefits in addition to the \$3.50 per hour required under the applicable wage determination.

(b) The hourly cash equivalent of those fringe benefits which are not listed in the applicable determination in terms of hourly cash amount may be obtained by mathematical computation through the use of pertinent factors such as the monetary wages paid the employee and the hours of work attributable to the period, if any, by which fringe benefits are measured in the determination. If the employee's regular rate of pay is greater than the minimum monetary wage specified in the wage determination and the contract, the former should be used for this computation, and if the fringe benefit determination does not specify any daily or weekly hours of work by which benefits should be measured, a standard 8-hour day and 40-hour week will be considered applicable. The application of these rules in typical situations is illustrated in paragraphs (c), (d), and (e) of this section.

(c) Where fringe benefits are stated as a percentage of the monetary rate, the hourly cash equivalent is determined by multiplying the stated percentage by the employee's regular or basic rate of pay. For example, if the determination calls for a 5 percent pension fund payment, and the employee is paid a monetary

rate of \$3.50 an hour, or if he earns \$3.50 an hour on a piece-work basis in a particular workweek, the cash equivalent of that payment would be 17½ cents an hour.

(d) If the determination lists a particular fringe benefit in such terms as \$25 a year, or as \$2 a week, the hourly cash equivalent is determined by dividing the amount stated in the determination by the number of working hours to which the amount is attributable. For example, if a determination lists a fringe benefit as "pension—\$2 a week," and does not specify weekly hours, the hourly cash equivalent is 5 cents per hour, i.e., \$2 divided by 40, the number of standard working hours in a week.

(e) In determining the hourly cash equivalent of those fringe benefits which are not listed in a determination in terms of hourly cash amount, but are stated, for example, as "six paid holidays per year" or "1-week paid vacation," the employee's hourly monetary rate of pay is multiplied by the number of hours making up the paid holidays or vacation. Unless the hours contemplated in the fringe benefit are specified in the determination, a standard 8-hour and 40-hour week will be considered applicable. The total annual cost so determined will be divided by 2,080, the typical number of nonovertime hours in a year of work, to arrive at the hourly cash equivalent. To illustrate, if a particular determination lists as a fringe benefit "six paid holidays per year," and the employee's hourly rate of pay is \$3.50, the \$3.50 is multiplied by 48 (6 days of 8 hours each) and the result, \$168.00, is then divided by 2,080 to arrive at the hourly cash equivalent, \$0.0808 an hour. Similarly, where a determination requires 1-week's paid vacation during the year, a computation of this kind for a short term employee who does not receive the vacation with pay would be necessary to determine the cash equivalent payment to which he is entitled for the proportionate part of the vacation earned during his period of employment.

[43 FR 1491, Jan. 10, 1978]

Section 4.54 Combination of equivalent fringe benefits and cash payments

Fringe benefit obligations may be discharged by furnishing any combination of cash or fringe

benefits as illustrated in sections 4.52 and 4.53, in amounts the total of which is equivalent, under the rules there stated, to the determined fringe benefits specified in the contract.

Section 4.55 Effect of equivalents in computing overtime pay

The Act (section 6) excludes from the regular or basic hourly rate of an employee, for purposes of determining the overtime pay to which he is entitled under any other Federal law, those fringe benefit payments computed under the Act which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(e) of that Act (29 U.S.C. 207(e)). Fringe benefit payments which qualify for such exclusion are described in Subpart C of Part 778 of this title. When such fringe benefits have been determined by the Secretary to be prevailing for service employees in the locality and are specified in the contract to be furnished to service employees engaged in its performance, the right to compute overtime pay in accordance with the above rule is not lost to a contractor or subcontractor because he discharges his obligation under this Act to furnish such fringe benefits through alternative equivalents as provided in this Subpart B. If he furnishes equivalent benefits or makes cash payments, or both, to such an employee as authorized herein, the amounts thereof, to the extent that they operate to discharge the employer's obligation to furnish such specified fringe benefits, may be excluded pursuant to this Act from the employee's regular or basic rate of pay in computing any overtime pay due the employee under any other Federal law. It is not necessary to consider in such a case whether such amounts would themselves be excludable under section 7(e) of the Fair Labor Standards Act. No such exclusion can operate, however, to reduce an employee's regular or basic rate of pay below the monetary wage rate specified as his minimum wage rate under section 2(a)(1) or 2(b) of this Act or under other law or by employment contract. The application of the rules set out in the regulations in this part will be considered and illustrated in the rulings and interpretations on applications of this Act.

SUBPART C—APPLICATION OF THE McNAMARA-O'HARA SERVICE CONTRACT ACT

INTRODUCTORY

Section 4.101 Official rulings and interpretations in this subpart

The purpose of this subpart is to provide, pursuant to the authority cited in section 4.104, official rulings and interpretations and respect to the application of the McNamara-O'Hara Service Contract Act for the guidance of the agencies of the United States and the District of Columbia which may enter into and administer contracts subject to its provisions, the persons desiring to enter into such contracts with these agencies, and the contractors, subcontractors, and employees who perform work under such contracts. This subpart supersedes all prior rulings and interpretations issued under the act to the extent, if any, that they may be inconsistent with rules herein stated. Principles governing the application of the act as set forth in this subpart are clarified or amplified in particular instances by illustrations and examples based on specific fact situations. Since such illustrations and examples cannot and are not intended to be exhaustive, no inference should be drawn from the fact that a subject or illustration is omitted. If doubt arises, inquiries with respect to matters other than safety and health standards should be directed to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, or to any regional office of the Wage and Hour Division. Safety and health inquiries should be addressed to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210, or to any OSHA regional office. A full description of the facts and any relevant documents should be submitted if an official ruling is desired.

[43 FR 28467, June 30, 1978]

Section 4.102 The Act

The McNamara-O'Hara Service Contract Act of 1965 (Public Law 89-286, 79 Stat. 1034, 41

U.S.C. 351 et seq.), hereinafter referred to as the Act, was approved by the President on October 22, 1965 (1 Weekly Compilation of Presidential Documents 428). It establishes standards for minimum compensation and safety and health protection of employees performing work for contractors and subcontractors on service contracts entered into with the Federal Government and the District of Columbia. It applies to contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after January 20, 1966. It has been amended by Pub. L. 92-473, 86 Stat. 789; by Pub. L. 93-57, 87 Stat. 140; and by Pub. L. 94-489, 90 Stat. 2358.

[42 FR 43065, Aug. 26, 1977]

Section 4.103 What the Act provides, generally

The provisions of the Act apply to contracts, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees. Under its provisions, every contract subject to the Act (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$2,500 must contain stipulations requiring (a) that specified minimum monetary wages and fringe benefits determined by the Secretary of Labor (based on wage rates and fringe benefits prevailing in the locality) be paid to service employees employed by the contractor or any subcontractor in performing the services contracted for; (b) that working conditions of such employees which are under the control of the contractor or subcontractor meet safety and health standards; and (c) that notice be given to such employees of the compensation due them under the minimum wage and fringe benefits provisions of the contract. The Act does not permit the monetary wage rates specified in such a contract to be less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act, as amended (29 U.S.C. 206(a)(1)). In addition, it

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is a violation of the Act for any contractor or subcontractor under a Federal contract subject to the Act, regardless of the amount of the contract, to pay any of his employees engaged in performing work on the contract less than such Fair Labor Standards Act minimum wage (or, in the case of certain linen supply contractors the alternative minimum wage provided under sec. 6(e) (2) of such Act). Contracts of \$2,500 or less are not, however, required to contain the stipulations described above. These provisions of the Service Contract Act are implemented by the regulations contained in Subparts A and B of this Part 4, and are discussed in more detail in subsequent sections of this subpart.

Section 4.104 Administration of the Act

As provided by section 4 of the Act and under provisions of sections 4 and 5 of the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U.S.C. 38, 39) which are made expressly applicable for the purpose, the Secretary of Labor is authorized and directed to administer and enforce the provisions of the McNamara-O'Hara Service Contract Act, to make rules and regulations, issue orders, make decisions, and take other appropriate action under the Act, including the provision of reasonable limitations and the making of such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from provisions of the Act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

AGENCIES WHOSE CONTRACTS MAY BE COVERED

Section 4.107 Federal contracts

(a) Section 2(a) of the Act covers contracts (and any bid specification therefor) "entered into by the United States" and section 2(b) applies to contracts entered into "with the Federal Government." Within the meaning of these provisions, contracts entered into by the United States and contracts with the Federal Government include generally all contracts to which any agency or instrumentality of the U.S. Government becomes a party pursuant to

authority derived from the Constitution and laws of the United States. The Act does not authorize any distinction in this respect between such agencies and instrumentalities on the basis of their inclusion in or independence from the executive, legislative, or judicial branches of the Government, the fact that they may be corporate in form, or the fact that payment for the contract services is not made from appropriated funds. Thus, contracts of wholly owned Government corporations, and those of nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces, are included among those subject to the general coverage of the Act. Contracts with the Federal Government and contracts entered into "by the United States" within the meaning of the Act do not, however, include contracts for services entered into on their own behalf by agencies or instrumentalities of other Governments within the United States such as those of the several States and their political subdivision or of Puerto Rico, the Virgin Islands, Guam, or American Samoa.

(b) Where a Federal agency exercises its contracting authority to procure services for the Government or Government personnel, the method of procurement utilized by the contracting agency is not controlling in determining coverage of the contract as one entered into by the United States. Such contracts may be entered into by the United States either through a direct award by a Federal agency or through the exercise by another agency (whether governmental or private) of authority granted to it to procure services for or on behalf of a Federal agency. Thus, sometimes authority to enter into service contracts of the character described in the Act for and on behalf of the Government and on a cost-reimbursable basis may be delegated, for the convenience of the contracting agency, to a prime contractor with the Government under the terms of a contract having a principal purpose other than the furnishing of services through the use of service employees (as, for example, a contract to operate or manage a Federal installation or facility or a Federal program). The contracts entered into by such a prime contractor with secondary contractors for and on behalf of the Federal agency pursuant to such delegated authority, which have such services as their principal purpose, are

deemed to be contracts entered into by the United States and contracts with the Federal Government within the meaning of the Act. However, service contracts entered into by Federal contractors or State or local public bodies with purveyors of services are not deemed to be entered into by the United States merely because such services are paid for with funds of the contractor or public body which have been received from the Federal Government as payment for contract work or as a grant under a Federal program. For example, a contract entered into by a municipal housing authority for tree trimming, tree removal, and landscaping for an urban renewal project financed by Federal funds is not a contract entered into by the United States and is not covered by the Service Contract Act.

Section 4.108 District of Columbia contracts

Section 2(a) of the Act covers contracts (and any bid specification therefor) in excess of \$2,500 which are "entered into by the * * * District of Columbia." The contracts of all agencies and instrumentalities which procure contract services for or on behalf of the District or under the authority of the District Government are contracts entered into by the District of Columbia within the meaning of this provision. Such contracts are also considered contracts "entered into with the Federal Government" within the meaning of section 2(b) of the Act. The legislative history indicates no intent to distinguish District of Columbia contracts from the other contracts made subject to the Act, and traditionally, under other statutes, District Government contracts have been made subject to the same labor standards provisions as contracts of other agencies and instrumentalities of the United States.

COVERED CONTRACTS GENERALLY

Section 4.110 What contracts are covered

The Act covers service contracts of the Federal agencies described in sections 4.107-4.108. Except as otherwise specifically provided (see sections 4.115 et seq.), all such contracts, the principal purpose of which is to furnish services in the United States through the

use of service employees, are subject to its terms. This is true of contracts entered into by such agencies with States or their political subdivisions, as well as such contracts entered into with private employers; however, contracts between a Federal or District of Columbia agency and another such agency are not within the purview of the Act. It makes no difference in the coverage of a contract whether the contract services are procured through negotiation or through advertising for bids. Also, the mere fact that an agreement is not reduced to writing does not mean that the contract is not within the coverage of the Act. The amount of the contract is not determinative of the Act's coverage, although the requirements are different for contracts in excess of \$2,500 and for contracts of a lesser amount. The Act is applicable to the contract if the principal purpose of the contract is to furnish services, if such services are to be furnished in the United States, and if service employees will be used in providing such services. These elements of coverage will be discussed separately in the following sections.

Section 4.111 Contracts "to furnish services"

(a) "*Principal purpose*" as criterion. Under its terms, the Act applies to a "contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services * * *" If the principal purpose is to provide something other than services of the character contemplated by the Act and any such services which may be performed are only incidental to the performance of a contract for another purpose, the Act does not apply. However, as will be seen by examining the illustrative examples of covered contracts in sections 4.130 et seq., no hard and fast rule can be laid down as to the precise meaning of the term "principal purpose." Whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case. Even where tangible items of substantial values are important elements of the subject matter of the contract, the facts may show that they are of secondary import to the furnishing of services in the particular case.

(b) *Determining whether a contract is for "services", generally.* Except indirectly through the definition of "service employee" the Act does not define, or limit, the types of "services" which may be contracted for under a contract "the principal purpose of which is to furnish services". As stated in the congressional committee reports on the legislation, the types of service contracts covered by its provisions are varied. Among the examples cited are contracts for laundry and dry cleaning, for transportation of the mail, for custodial, janitorial or guard service, for packing and crating, for food service, and for miscellaneous housekeeping services. Covered contracts for services would also include those for other types of services which may be performed through the use of the various classes of service employees included in the definition in section 8(b) of the Act (see section 4.113). Examples of some such contracts are set forth in sections 4.130 et seq. In determining questions of contract coverage, due regard must be given to the apparent legislative intent to include generally as contracts for "services" those contracts which have as their principal purpose the procurement of something other than the construction activity described in the Davis-Bacon Act or the materials, supplies, articles, and equipment described in the Walsh-Healey Act. The Committee reports in both House and Senate, and statements made on the floor of the House, took note of the labor standards protections afforded by these two Acts to employees engaged in the performance of construction and supply contracts and observed: "The service contract is now the only remaining category of Federal contracts to which no labor standards protections apply" (H. Rept. 948, p. 1; see also S. Rept. 789 p. 1; daily Congressional Record Sept. 20, 1965, p. 23497). A similar understanding of contracts principally for "services" as embracing contracts other than those for construction or supplies is reflected in the statement of President Johnson upon signing the Act (1 Weekly Compilation of Presidential Documents, p. 428).

Section 4.112 Contracts to furnish services "in the United States"

(a) The Act covers contract services furnished "in the United States". The geographical area

included in the "United States" is defined in section 8(d) as "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Islands, Eniwetok Atoll, Kwajalein Atoll, Johnston Island and Canton Island." The definition expressly excludes any other territory under the jurisdiction of the United States (e.g. the Canal Zone) and any United States base or possession within a foreign country. Services to be performed exclusively on a vessel operating in international waters outside the geographic areas named in section 8(d) would not be services furnished "in the United States" within the meaning of the Act.

(b) A service contract to be performed in its entirety outside the geographic limits of the United States as thus defined is not covered and is not subject to the labor standards of the Act. See section 4.6(m) (8). However, if a service contract to be performed in part within and in part without these geographic limits, the stipulations required by section 4.6 or section 4.7, as appropriate, must be included in the invitation for bids or negotiation documents and in the contract, and the labor standards must be observed with respect to that part of the contract services that is performed within these geographic limits. In such a case the requirements of the Act and of the contract clauses will not be applicable to the services furnished outside the United States.

[33 FR 9880, July 10, 1968, as amended at 42 FR 43065, Aug. 26, 1977]

Section 4.113 Contracts to furnish services "through the use of service employees"

(a) *Use of "service employees" in contract performance.* (1) As indicated in section 4.110, the Act covers service contracts in which "service employees" will be used in performing the services which it is the purpose of the contract to procure. A service contract otherwise subject to the Act ordinarily will meet this condition if any of the services which it is the principal purpose of the contract to obtain will be furnished through the use of any service employee or employees. Even where it is

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contemplated that the services (of the kind performed by service employees) will be performed individually by the contractor himself, the contract cannot be considered outside the reach of the Act unless it is known in advance that the contractor will in no event use any service employee during the term of the contract in furnishing the services called for. If the contracting officer knows when advertising for bids or concluding negotiations that no such employee will be used by the contractor in any event in providing the contract services, the Act will not be deemed applicable to the contract and the contract clauses required by section 4.6 or section 4.7 may be omitted. However, in all other cases such clauses must be included in the contract documents, for application in the event service employees are used in furnishing the services. The fact that the required services will be performed by municipal employees or employees of a State would not remove the contract from the purview of the Act, as this Act does not contain any exemption for contracts performed by such employees. Also, where the services the Government wants under the contract are principally of a type that will require the use of service employees as defined in section 8(b) of the Act, the contract is not taken out of the purview of the Act by the fact that the manner in which the services of such employees are performed will be subject to the continuing overall supervision of professional personnel to whose services the Act would not be considered to apply.

(2) The coverage of the Act does not extend, however, to the contracts which have as their principal purpose the procurement of a type of service in the furnishing of which no service employees will be used. A contract for medical services is an example of such a contract. So are other contracts under which the desired services called for by the Government are to be performed by bona fide executive, administrative, or professional personnel as defined in Part 541 of this title (see paragraph (b) of this section). Also, any contract for professional services which is performed essentially by professional employees, with the use of service employees being only a minor factor in the performance of the contract, is not covered by the Act. While the incidental employment of service employees

will not render a contract for professional services subject to the Act, a contract which requires the use of service employees to a substantial extent would be covered even though there is some use of professional employees in performance of the contract.

(b) "*Service employees*" defined. In determining whether or not any of the contract services will be performed by service employees, the definition of "service employee" in section 8(b) of the Act is controlling. It provides:

"The term 'service employee' means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons."

It will be noted that the definition expressly excludes those employees who are employed in a bona fide executive, administrative, or professional capacity as defined in Part 541 of this title and as discussed further in section 4.156. Some of the specific types of service employees who may be employed on service contracts are noted in subsequent sections which discuss the application of the Act to employees.

[33 FR 9880, July 10, 1968, as amended at 42 FR 43065, Aug. 26, 1977]

Section 4.114 Subcontracts

(a) *Requirements applicable to subcontractors.* The Act's provisions apply to the performance not only of the contracts entered into with the United States or the District of Columbia which they cover but also to the performance of any subcontract thereunder. The Act and the regulations (sections 4.6-4.7) require the Government prime contractor to agree that the required labor standards will be observed by his subcontractors as well as by himself, that the prescribed contract clauses relating thereto will be inserted in all subcontracts, and that appropriate sanctions provided under the Act may be invoked against him in the

event of any failure to comply. Subcontractors responsible for violation of the contract stipulations are also liable for underpayments of wages which the stipulations require to be paid and are subject to the enforcement provisions of the Act. The payment by subcontractors to their employees, performing work on covered contracts with the Federal Government, of less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)) is expressly prohibited.

(b) "Contractor" as including "subcontractor." Except where otherwise noted or where the term "Government prime contractor" is used, the term "contractor" as used in this Part 4 shall be deemed to include a subcontractor. The term "contractor" as used in the contract clauses required by Subpart A in any subcontract under a covered contract shall be deemed to refer to the subcontractor, or, if in a subcontract entered into by such a subcontractor, shall be deemed to refer to the lower level subcontractor.

[33 FR 9880, July 10, 1968, as amended at 43 FR 1492, Jan. 10, 1978]

SPECIFIC EXCLUSIONS

Section 4.115 Exemptions and exceptions generally

The Act, in section 7, specifically excludes from its coverage certain contracts and work which might otherwise come within its terms as procurements the principal purpose of which is to furnish services through the use of service employees. In addition, as noted in section 4.104 provision is made in section 4 of the Act for administrative action by the Secretary of Labor providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from provisions of the Act in accordance with standards set forth in the section. These provisions of the Act apply as explained in the following discussion. The limitations stated in this subpart in defining the scope of the statutory exemptions are reasonable limitations that have been found necessary and proper in the public interest in accordance with the provisions of section 4(b) of the Act.

Section 4.116 Contracts for construction activity

(a) *General scope of exemption.* The Act, in paragraph (1) of section 7, exempts from its provisions "any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works." This language corresponds to the language used in the Davis-Bacon Act to describe its coverage (40 U.S.C. 270a). The legislative history of the McNamara-O'Hara Service Contract Act indicates that the purpose of the provision is to avoid overlapping coverage of the two acts by excluding from the application of the McNamara-O'Hara Act those contracts (and any bid specification therefor) to which the Davis-Bacon Act is applicable and in the performance of which the labor standards of that Act are intended to govern the compensation payable to the employees of contractors and subcontractors on the work. (See H. Rept. 798, pp. 2, 5, and H. Rept. 948, pp. 1, 5, also Hearing, Special Subcommittee on Labor, House Committee on Education and Labor, p. 9 (89th Cong., 1st sess.)) The intent of section 7(1) is simply to exclude from the provisions of the Act those construction contracts which involve the employment of persons whose wage rates and fringe benefits are determinable under the Davis-Bacon Act.

(b) *Contracts not within exemption.* (1) Section 7(1) does not exempt contracts which, for purposes of the Davis-Bacon Act, are not considered to be of the character described by the corresponding language in that Act, and to which the provisions of such Act are therefore not applied. Such contracts are accordingly subject to the McNamara-O'Hara Act where their principal purpose is to furnish services in the United States through the use of service employees. For example, a contract for clearing timber or brush from land or for the demolition or dismantling of buildings or other structures located thereon may be a contract for construction activity subject to the Davis-Bacon Act where it appears that the clearing of the site is to be followed by the construction of a public building or public work at the same location. If,

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however, no further construction activity at the site is contemplated the Davis-Bacon Act may be considered inapplicable to such clearing, demolition, or dismantling work. In such event, the exemption in section 7(1) of the McNamara-O'Hara Act has no application and the contract will be subject to the Act in accordance with its general coverage provisions.

(2) Also, where the principal purpose of a contract is to furnish services in the United States through the use of service employees whose wage rates and fringe benefits are not determinable under the Davis-Bacon Act, the fact that the contract may, by a literal reading of section 7(1), be considered to come within its exemptive language does not justify an application of the exemption where this would result in no wage determinations for these employees under either Act. This is found to be a reasonable limitation on the exemption, consistent with the rule of narrow construction of exemptions from remedial statutes and with the legislative history of this Act, which is necessary and proper in the public interest, in accordance with the provisions of section 4(b) of the Act.

(3) It should be noted also that contracts in the amount of \$2,000 or less and contracts to be performed in geographic areas outside the boundaries of the 50 States and the District of Columbia are not subject to the Davis-Bacon Act. Such a contract is within the general coverage provisions of the McNamara-O'Hara Act, however, if it is to be performed within the "United States" as defined in such Act and if its principal purpose is to furnish services through the use of service employees. If the contract meets these tests, it will not be deemed exempt under section 7(1) of the Act even though it calls for construction activity, since there is no suggestion in the legislative history that the Congress intended this exclusion to apply to contracts not subject to the Davis-Bacon Act or to leave employees performing such contracts outside the protection of either Act. This is found to be a reasonable limitation of the exemption which is necessary and proper in the public interest in accordance with the provisions of section 4(b) of the Act.

(c) *Partially exempt contracts.* Instances may arise in which, for the convenience of the Government, instead of awarding separate con-

tracts for construction work subject to the Davis-Bacon Act and for services of a different type to be performed by service employees, the contracting officer may include separate specifications for each type of work in a single contract calling for the performance of both types of work. For example, a contracting agency may invite bids for the installation of a plumbing system in a public building and for the maintenance of the system for one year, under separate bid specifications. In such a case, the exemption provided by section 7(1) will be deemed applicable only to that portion of the contract which calls for construction activity subject to the Davis-Bacon Act. The contract documents are required to contain the clauses prescribed by section 4.6 for application to the contract obligation to furnish services through the use of service employees, and the provisions of the McNamara-O'Hara Act will apply to that portion of the contract. This is a reasonable limitation of the application of the exemption found to be necessary and proper in the public interest in accordance with the provisions of section 4(b) of the Act.

Section 4.117 Contracts for carriage subject to published tariff rates

The Act, in paragraph (3) of section 7, exempts from its provisions "any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect". In order for this exemption to be applicable, the contract must be for such carriage by a common carrier described by the terms used. It does not, for example, apply to contracts for taxicab or ambulance service, because taxicab and ambulance companies are not among the common carriers specified by the statute. Also, a contract for transportation service does not come within this exemption unless the service contracted for is actually governed by published tariff rates in effect pursuant to State or Federal law for such carriage. The contracts excluded from the reach of the Act by this exemption are typically those where there is on file with the Interstate Commerce Commission or an appropriate State or local regulatory body a tariff rate applicable to the transportation involved, and the

transportation contract between the Government and the carrier is evidenced by a bill of lading citing the published tariff rate. It should be noted further that only such contracts for the carriage of "freight or personnel" are exempt. This exemption thus does not exclude any contracts for the transportation of mail from the application of the Act, because the term "freight" does not include the mail. (For an administrative exemption of certain contracts with common carriers for carriage of mail, see section 4.6(m)(9).)

Section 4.118 Contracts for services of communications companies

The Act, in paragraph (4) of section 7, exempts from its provisions "any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934." This exemption is applicable to contracts with such companies for communication services regulated under the Communications Act. It does not exempt from the Act any contracts with such companies to furnish any other kinds of services through the use of service employees.

Section 4.119 Contracts for public utility services

The Act, in paragraph (5) of section 7, exempts from its provisions "any contract for public utility services, including electric light and power, water, steam, and gas." This exemption is applicable to contracts for such services with companies whose rates therefor are regulated under State, local, or Federal law governing operations of public utility enterprises. Contracts entered into with public utility companies to furnish services through the use of service employees, other than those subject to such rate regulation, are not exempt from the Act. Among the contracts included in the exemption would be those between Federal electric power marketing agencies and investor-owned electric utilities, Rural Electrification Administration cooperatives, municipalities and State agencies engaged in the transmission and sale of electric power and energy. (See H. Rept. No. 948, 89th Cong., 1st sess., p. 4.)

Section 4.120 Contracts for operation of postal contract stations

The Act, in paragraph (7) of section 7, exempts from its provisions "any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations." The exemption is limited to postal service contracts having the operation of such stations as their principal purpose. A provision of the legislation which would also have exempted contracts with the Post Office Department having as their principal purpose the transportation, handling, or delivery of the mails was eliminated from the bill during its consideration by the House Committee on Education and Labor (H. Rept. 948, p. 1, 89th Cong., 1st sess.)

Section 4.121 Contracts for individual services

The Act, in paragraph (6) of section 7, exempts from its provisions "any employment contract providing for direct services to a Federal agency by an individual or individuals." This exemption, which applies only to an "employment contract" for "direct services," makes it clear that the Act's application to Federal contracts for services is intended to be limited to service contracts entered into with independent contractors. If a contract to furnish services (to be performed by a service employee as defined in the Act) provides that they will be furnished directly to the Federal agency by the individual under conditions or circumstances which will make him an employee of the agency in providing the contract service, the exemption applies and the contract will not be subject to the Act's provisions. The exemption does not exclude from the Act any contract for services of the kind performed by service employees which is entered into with an independent contractor whose individual services will be used in performing the contract, but as noted earlier in section 4.113, such a contract would be outside the general coverage of the Act if only the contractor's individual services would be furnished and no service employee would in any event be used in its performance.

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Section 4.122 Work subject to requirements of Walsh-Healey Act

The Act, in paragraph (2) of section 7, exempts from its provisions "any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036)." It will be noted that this like the similar provision in the Contract Work Hours and Safety Standards Act (40 U.S.C. 329 (b)), is an exemption for "work" rather than for "contracts" subject to the Walsh-Healey Act. The purpose of the exemption was to eliminate possible overlapping of the differing labor standards of the two Acts, which otherwise might be applied to employees performing work on a contract covered by the McNamara-O'Hara Act if such contract and their work under it should also be deemed to be covered by the Walsh-Healey Act. The Walsh-Healey Act applies to contracts in excess of \$10,000 for the manufacture or furnishing of materials, supplies, articles or equipment. There is no overlap of coverage, therefore, in the case of contracts in amounts not in excess of \$10,000. Nor is there an overlap if the principal purpose of the contract is the manufacture or furnishing of such materials etc., rather than the furnishing of services of the character referred to in the McNamara-O'Hara Act, for such a contract is not within the general coverage of the latter Act. In such cases the exemption in section 7(2) is not pertinent. It is pertinent, however, in the case of contracts exceeding \$10,000 which are covered by the McNamara-O'Hara Act, because they have as their principal purpose the furnishing of services through the use of service employees, and are also covered by the Walsh-Healey Act, because it applies to contracts in the required amount, irrespective of their principal purpose, if the furnishing of materials, supplies, articles, or equipment in a substantial amount is called for by the contract or is a significant or independent purpose of the contract. Under such contracts, the "work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act," which is exempted by section 7(2), includes only the work of those employees who are "engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the con-

tract" (41 CFR 50-201.102). Service employees engaged in such work on a contract covered by both Acts are thus exempt under section 7(2) from the provisions of the McNamara-O'Hara Act and subject only to the provisions of the Walsh-Healey Act, while other employees such as guards, watchmen, and employees performing only general office or clerical work are not covered by the Walsh-Healey Act or within this exemption, and are covered by the provisions of the McNamara-O'Hara Act when performing work on a contract subject to its terms.

[33 FR 9880, July 10, 1968, as amended at 43 FR 28467, June 30, 1978]

Section 4.123 Administrative limitations, variations, tolerances, and exemptions

(a) *Authority of the Secretary.* The Act, in section 4(b) authorizes the Secretary to "provide such reasonable limitations" and to "make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business." This authority is similar to that vested in the Secretary under section 6 of the Walsh-Healey Public Contracts Act (41 U.S.C. 40) and under section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 331).

(b) (1) *Administrative action under section 4(b) of the Act.* The authority conferred on the Secretary by section 4(b) of the Act will be exercised with due regard to the remedial purpose of the statute to protect prevailing labor standards and to avoid the undercutting of such standards which could result from the award of Government work to contractors who will not observe such standards, and whose saving in labor cost therefrom enables them to offer a lower price to the Government than can be offered by the fair employers who maintain the prevailing standards. Administrative action consistent with this statutory purpose may be taken under section 4(b) with or without a request therefor, when found necessary and proper in accordance with the statutory standards. No formal procedures have been prescribed for requesting such action, except as provided in subparagraph (2) of this paragraph. However, a

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request for exemption from the Act's provisions will be granted only upon a strong and affirmative showing that it is necessary and proper in the public interest or to avoid serious impairment of Government business. If the request for administrative action under section 4(b) is not made by the headquarters office of the contracting agency to which the contract services are to be provided, the views of such office on the matter should be obtained and submitted with the request or the contracting officer may forward such a request through channels to the agency headquarters for submission with the latter's views to the Administrator of the Wage and Hour Division, Department of Labor, whenever any wage payment issues are involved. Any request relating to an occupational safety or health issue shall be submitted to the Assistant Secretary for Occupational Safety and Health, Department of Labor.

(2) *Occupational safety and health issues.* In considering any request for a variation on any occupational safety or health issue arising under the contract clause prescribed in section 4.6(f), there shall be provided procedural safeguards equivalent to those prescribed in section 6(d) of the Occupational Safety and Health Act of 1970 (84 Stat. 1596). Pending the adoption of rules of procedure applying the aforementioned section 6(d), the applicable rules of procedure shall be specified in the notice of any hearing which may be provided.

(c) *Documentation of official action under section 4(b).* All papers and documents made a part of the official record of administrative action pursuant to section 4(b) of the Act are available for public inspection in accordance with the regulations in 29 CFR Part 70. Limitations, variations, tolerances and exemptions of general applicability and legal effect promulgated pursuant to such authority are published in the FEDERAL REGISTER and made a part of the rules incorporated in this Part 4. For convenience in use of the rules they are set forth in the sections of this part covering the subject matter to which they relate, rather than as a separate listing. (See, for example, the exemption provided in section 4.5(b) and the limitations set forth in sections 4.115 et seq.) Any rules that are promulgated under section 4(b) of the Act relating to subject matter not dealt with

elsewhere in this Part 4 will be set forth immediately following this paragraph.

[33 FR 9880, July 10, 1968, as amended at 36 FR 9864, May 29, 1971; 43 FR 28467, June 30, 1978]

PARTICULAR APPLICATIONS OF CONTRACT COVERAGE PRINCIPLES

Section 4.130 Types of covered service contracts illustrated

The types of contracts, the principal purpose of which is to furnish services through the use of service employees, are too numerous and varied to permit an exhaustive listing. The following list is illustrative, however, of the types of services called for by such contracts that have been found to come within the coverage of the Act.

- (a) Aerial spraying.
- (b) Aerial reconnaissance for fire detection.
- (c) Ambulance service.
- (d) Cafeteria and food service.
- (e) Chemical testing and analysis.
- (f) Clothing alteration and repair.
- (g) Custodial and janitorial services.
- (h) Electronic equipment maintenance and operation.
 - (i) Flight training.
 - (j) Forest fire fighting.
 - (k) Geological field surveys.
 - (l) Grounds maintenance.
 - (m) Guard or watchman service.
 - (n) Landscaping (other than part of construction).
 - (o) Laundry and dry cleaning.
 - (p) Linen supply service.
 - (q) Lodging and meals.
 - (r) Mail hauling.
 - (s) Maintenance and repair of motor equipment.
 - (t) Maintenance and repair of office equipment.
 - (u) Miscellaneous housekeeping.
 - (v) Motor Pool operation.
 - (w) Packing and crating.
 - (x) Parking services.
 - (y) Snow removal.
 - (z) Stenographic reporting.
 - (aa) Support services at military installations.

- (bb) Taxicab services.
- (cc) Tire and tube repairs.
- (dd) Transporting property or personnel (except as explained in section 4.117).
- (ee) Trash and garbage removal.
- (ff) Warehousing or storage.
- (gg) Drafting and illustrating.
- (hh) Mortuary services.

Section 4.131 Furnishing services involving more than use of labor

(a) If the principal purpose of a contract is to furnish services in the performance of which service employees will be used, the Act will apply to the contract, in the absence of an exemption, even though the use of nonlabor items may be an important element in the furnishing of the services called for by its terms. The Act is concerned with protecting the labor standards of workers engaged in performing such contracts, and is applicable if the statutory coverage test is met, regardless of the proportion of the labor cost to the total cost of furnishing the contract services, the form in which the contract is drafted, or the necessity of providing tangible nonlabor items in performing the contract obligations. A procurement that requires tangible items to be supplied as a part of the service furnished is covered by the Act so long as the facts show that the contract is chiefly for services, and that the furnishing of tangible items is of secondary importance.

(b) Some examples of covered contracts illustrating these principles may be helpful. One such example is a contract for the maintenance and repair of typewriters. Such a contract may require the contractor to furnish typewriter parts, as the need arises, in performing the contract services. Since this does not change the principal purpose of the contract, which is to furnish the maintenance and repair services through the use of service employees, the contract remains subject to the Act. The same is true of contracts for maintenance or repair of motor vehicles or other equipment. (As noted in section 4.122, if such contracts exceed \$10,000 in amount, the Walsh-Healey Public Contracts Act may also apply to them, in which event the employees performing work required to be done in accordance with its provisions would be

exempt from the application of the Service Contract Act.)

(c) Another example of the application of the above principle is a contract for the recurrent supply to a Government agency of freshly laundered items on a rental basis. It is plain from the legislative history that such a contract is typical of those intended to be covered by the Act. Although tangible items owned by the contractor are provided on a rental basis for the use of the Government, the service furnished by the contractor in making them available for such use when and where they are needed, through the use of service employees who launder and deliver them, is the principal purpose of the contract. Similarly, a contract in the form of rental of equipment with operators for the plowing and reseedling of a park area is a service contract. The Act applies to it because its principal purpose is the service of plowing and reseedling, which will be performed by service employees, although as a necessary incident the contractor is required to furnish equipment. For like reasons the contracts for aerial spraying and aerial reconnaissance listed in section 4.130 are covered, even though the use of airplanes, an expensive item of equipment, is essential in performing such services. Contracts under which the contractor agrees to provide the Government with vehicles or equipment on a rental basis with drivers or operators are similarly deemed contracts to furnish services, in the performance of which service employees will be used. (Such contracts are not considered contracts for furnishing equipment within the meaning of the Walsh-Healey Public Contracts Act.)

Section 4.132 Services and other items to be furnished under single contract

If the principal purpose of a contract specification is to furnish services through the use of service employees within the meaning of the Act, the contract to furnish such services is not removed from the Act's coverage merely because, as a matter of convenience in procurement, it is combined in a single contract document with specifications for the procurement of different or unrelated items. For example, a contracting agency may invite bids for supplying a quantity of new typewriters and for

the maintenance and repair of the typewriters already in use, under separate bid specifications. The principal purpose of the latter, but not the former, would be the furnishing of services through the use of service employees. A typewriter company might be the successful bidder on both items and the specifications for each might be included in a single contract for the convenience of the parties. In such a case, the contract obligation to furnish the maintenance and repair services would be subject to the provisions of the Act. The "principal purpose" test would be applicable to the specification for such services rather than to the combined contract. The Act would not apply in such case to the contract obligation to furnish new typewriters, although its performance would be subject to the provisions of the Walsh-Healey Public Contracts Act if the amount was in excess of \$10,000.

Section 4.133 Government as beneficiary of contract services

(a) *In general.* The Act does not say to whom the services under a covered contract must be furnished; so far as its language is concerned, it is enough if the contract is "entered into" by and with the Government and if its principal purpose is "to furnish services in the United States through the use of service employees." The legislative history indicates an intention to cover at least contracts for services of direct benefit to the Government, its property, or its civilian or military personnel for whose needs it is necessary or desirable for the Government to make provision for such services. Such contracts as those for furnishing food service and laundry and dry cleaning service for personnel at military installations, for example, were specifically referred to. Where the principal purpose of the Government contract is to provide these or other services to the Government or its personnel through the use of service employees, the contract is within the general coverage of the Act regardless of the source of the funds from which the contractor is paid for the service and irrespective of whether he performs the work in his own establishment, on a Government installation, or elsewhere. The fact that the contract permits him to provide the services directly to

individual personnel as a concessionaire, rather than through the contracting agency, does not require a different conclusion.

(b) *Special situations.* It is not considered that the Act was intended to cover every contract, however, which is entered into with the Government by a contractor to furnish services, no matter how indirect or remote a benefit the Government may derive therefrom. If, for example, a contract with the Government grants the contractor the privilege of operating as a concessionaire in a Government park for the purpose of furnishing services to the public generally rather than to the Government or to personnel engaged in its business, the contract is not considered subject to the Act. Since the statute itself provides no clear line of demarcation, questions of contract coverage where doubt arises because of remoteness of benefit to the Government from the services to be furnished should be referred to the Office of Government Contract Wage Standards, for resolution.

[33 FR 9880, July 10, 1968, as amended at 36 FR 286, Jan. 8, 1971; 43 FR 28467, June 30, 1978]

Section 4.134 Contracts outside the Act's coverage

(a) Contracts entered into by agencies other than those of the Federal Government or the District of Columbia as described in sections 4.107-4.108 of this subpart are not within the purview of the Act. Thus, the Act does not cover service contracts entered into with any agencies of Puerto Rico, the Virgin Islands, American Samoa, or Guam acting in behalf of their respective local governments. Similarly, it does not cover service contracts entered into by agencies of States or local public bodies, not acting as agents for or on behalf of the United States or the District of Columbia, even though Federal financial assistance may be provided for such contracts under Federal law or the terms and conditions specified in Federal law may govern the award and operation of the contracts.

(b) Further, as already noted in sections 4.111-4.113, the Act does not apply to Government contracts which do not have as their principal purpose the furnishing of services, or which call for no services to be furnished within

the United States or through the use of service employees as those terms are defined in the Act. Clearly outside the Act's coverage for these reasons are such contracts as those for the purchase of tangible products which the Government needs (e.g. fuel, vehicles, office equipment, and supplies), for the logistic support of an air base in a foreign country or for the services of a lawyer to examine the title to land. Similarly, where the Government contracts for a lease of building space for Government occupancy and as an incidental part of the lease agreement the building owner agrees to furnish janitorial and other building services through the use of service employees, the leasing of the space rather than the furnishing of the building services is the principal purpose of the contract, and the Act does not apply. Another type of contract which is outside the coverage of the Act because it is not for the principal purpose of furnishing services may be illustrated by a contract for the rental of parking space under which the Government agency is simply given a lease or license to use the contractor's real property. Such a contract is to be distinguished from contracts for the live storage of vehicles which are delivered into the possession or custody of the contractor, who will provide the required services including the parking or retrieval of the vehicle.

(c) There are a number of types of contracts which, while outside the Act's coverage in the usual case, may be subject to its provisions under the conditions and circumstances of a particular procurement, because these may be such as to require a different view of the principal purpose of the contract. Thus, the ordinary contract for the recapping of tires would have as its principal purpose the manufacture and furnishing of rebuilt tires for the Government rather than the furnishing of services through the use of service employees, and thus would be outside the Act's coverage. Similarly, contracts calling for printing, reproduction, and duplicating ordinarily would appear to have as their principal purpose the furnishing in quantity of printed, reproduced, or duplicated written materials rather than the furnishing of the reproduction services through the use of service employees. However, in a particular case, the terms, conditions, and

circumstances of the procurement would be such that the facts would show its purpose to be chiefly the obtaining of services (e.g., repair services, typesetting, photostating, editing, etc.), and where such services would require the use of service employees the contract would be subject to the Act unless excluded therefrom for some other reason.

(d) A further category of contracts outside the coverage of the Act includes those service contracts which would otherwise be covered but to which the Act does not apply because they were entered into pursuant to negotiations concluded or invitations for bids issued before January 20, 1966 (see section 4.102) and have remained in effect without change since that date.

DETERMINING AMOUNT OF CONTRACT

Section 4.140 Significance of contract amount

As set forth in section 4.103 and in the requirements of sections 4.6-4.7, the obligations of a contractor with respect to labor standards differ in the case of a covered and nonexempt contract, depending on whether the contract is or is not in excess of \$2,500. Rules for resolving questions that may arise as to whether a contract is or is not in excess of this figure are set forth in the following sections.

Section 4.141 General criteria for measuring amount

(a) In general, the contract amount is measured by the consideration agreed to be paid, whether in money or other valuable consideration, in return for the obligations assumed under the contract. Thus, even though a contractor, such as a wrecker entering into a contract with the Government to raze a building on a site which will remain vacant, may not be entitled to receive any money from the Government for such work under his contract or may even agree to pay the Government in return for the right to dispose of the salvaged materials, the contract will be deemed one in excess of \$2,500 if the value of the property obtained by the contractor, less anything he might pay the Government, is in excess of such amount.

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(b) All bids from the same person on the same invitation for bids will constitute a single offer, and the total award to such person will determine the amount involved for purposes of the Act. Where the procurement is made without formal advertising, in arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising. However, where an invitation is for services in an amount in excess of \$2,500 and bidders are permitted to bid on a portion of the services not amounting to more than \$2,500, the amounts of the contracts awarded separately to individual and unrelated bidders will be measured by the portions of the services covered by their respective contracts.

(c) Where a contract is issued in an amount in excess of \$2,500 this amount will govern for purposes of application of the Act even though penalty deductions, deductions for prompt payment, and similar deductions may reduce the amount actually expended by the Government to \$2,500 or less.

Section 4.142 Contracts in an indefinite amount

(a) Every contract subject to this Act (and any bid specification therefor) which is indefinite in amount and is not otherwise exempt from the requirements of section 2(a) of the Act and section 4.6 is required to contain the clauses prescribed in section 4.6 for contracts in excess of \$2,500, unless the contracting officer has definite knowledge in advance that the contract will not exceed \$2,500 in any event.

(b) Where contracts or agreements between a Government agency and prospective purveyors of services are negotiated, which provide terms and conditions under which services will be furnished through the use of service employees in response to individual purchase orders or calls, if any, which may be issued by the agency during the life of the agreement, these agreements would ordinarily constitute contracts within the intentment of the Act under principles judicially established in *United Biscuit Co.*

v. Wirtz 17 WH Cases 146 (C.A.D.C.), a case arising under the Walsh-Healey Public Contracts Act. Such a contract, which may be in the nature of a bilateral option contract and not obligate the Government to order any services or the contractor to furnish any, nevertheless governs any procurement of services that may be made through purchase orders or calls issued under its terms. Since the amount of the contract is indefinite, it is subject to the rule stated in paragraph (a) of this section. The amount of the contract is not determined by the amount of any individual call or purchase order.

CHANGES IN CONTRACT COVERAGE

Section 4.143 Effects of changes or extensions of contracts, generally

Sometimes an existing service contract is modified, amended, or extended in such a manner or at such a time that, if originally entered into in its changed form at such time, the application of provisions of the Act to it would be different at such time from the application of the Act's provisions to the original contract at the time it was entered into. One example is a contract to which the Act did not originally apply because invitations for bids thereon were issued prior to January 20, 1966, which is subsequently extended. Another example is a contract which, when originally executed, was exempted from the provisions of section 2(a) of the Act and section 4.6 requiring specification in the contract of predetermined monetary wage rates and fringe benefits, because no wage determination had been made prior to the invitation for bids; and then, at a later time, contract amendments relative to the scope of the work are incorporated after prevailing wage and fringe benefit determinations have been made for classes of service employees in the locality which will be engaged in the contract work. The general rule with respect to such contracts is, that whenever changes are made in the terms of the contract, the provisions of the Act and the regulations thereunder will apply to the changed contract in the same manner and to the same extent as they would to a wholly new contract in the same terms if such a contract were entered into at the time of the change.

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Under this rule, the contract in the first example would become subject to the Act and regulations when the changes were effected in it, although it was not originally covered. Similarly, the specified monetary wages and fringe benefits would have to be incorporated in the amended contract in the second example, although not required in the contract originally entered into. However, contract modifications or amendments (other than contract extensions) that are unrelated to the labor requirements of a contract will not be deemed to create a new contract for purposes of the Act. In addition, only significant changes related to labor requirements will be considered as creating new contracts. This limitation on the application of the Act has been found to be a reasonable one, and necessary and proper in the public interest and to avoid serious impairment of the conduct of Government business in accordance with the provisions of section 4(b) of the Act. Also, a contract will be deemed entered into when the term of an existing contract is extended, pursuant to an option clause or otherwise, so that the contractor furnishes services over an extended period of time, rather than being granted extra time to fulfill his original commitment.

Section 4.144 Contract modifications affecting amount

Pursuant to the rule set forth in section 4.143, where a contract which was originally issued in an amount not in excess of \$2,500 is later modified so that its amount may exceed that figure, all the provisions of section 2(a) of the Act, and the regulations thereunder are applicable from the date of modification to the date of contract completion. In the event of such modification the contracting officer will immediately insert the required contract clauses into the contract and notify the Department of Labor of such action. In the event that a contract for services subject to the Act in excess of \$2,500 is modified so that it cannot exceed \$2,500, compliance with the provisions of section 2(a) of the Act and the contract clauses required thereunder ceases to be an obligation of the contractor when such modification becomes effective.

Section 4.145 Extended term contracts

Sometimes service contracts are entered into for a term of years; however, their continuation in effect is subject to the appropriation by Congress of funds for each new fiscal year. In such event, for purposes of this Act, a contract shall be deemed entered into at the beginning of each new fiscal year during which the terms of the original contract are made effective by an appropriation for the purpose. In other cases a service contract, entered into for a specified term by a Government agency, may contain a provision such as an option clause under which the agency may unilaterally extend the contract for a period of the same length or other stipulated period. If a new appropriation is required to finance such extension, the rule just stated will apply. In any event, however, since the exercise of the option results in the rendition of services for a new or different period not included in the term for which the contractor is obligated to furnish services or for which the Government is obligated to pay under the original contract in the absence of such action to extend it, the contract for the additional period is within the intentment of the Act in the same position as a wholly new contract with respect to application of the Act's provisions and the regulations thereunder.

PERIOD OF COVERAGE

Section 4.146 Contract obligations after award, generally

A contractor's obligation to observe the provisions of the Act arises on the date he is informed that he has received the award of the contract, not necessarily the date of formal execution. However, he is required to comply with the provisions of the Act and regulations thereunder only while his employees are performing on the contract, provided his records make clear the period of such performance.

EMPLOYEES COVERED BY THE ACT

Section 4.150 Employee coverage generally

The Act, in section 2(b), makes it clear that its provisions apply generally to all employees

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engaged in performing work on a covered contract entered into by the contractor with the Federal Government, regardless of whether they are his employees or those of any subcontractor under such contract. All employees who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are thus subject to the Act unless a specific exemption (see sections 4.115 et seq.) is applicable. All such employees must be paid wages at a rate not less than the minimum wage specified under section 6(a) (1) of the Fair Labor Standards Act (29 U.S.C. 206(a) (1), as amended). Payment of a higher minimum monetary wage and the furnishing of fringe benefits may be required under the contract, pursuant to the provisions of section 2(a)(1), (2), of the Act.

[43 FR 1492, Jan. 10, 1978]

Section 4.151 Employees covered by provisions of section 2(a)

The provisions of section 2(a) of the Act prescribe labor standards requirements applicable, except as otherwise specifically provided, to every contract in excess of \$2,500 which is entered into by the United States or the District of Columbia for the principal purpose of furnishing services in the United States through the use of service employees. These provisions apply to all service employees engaged in the performance of such a contract or any subcontract thereunder. The Act, in section 8(b) defines the term "service employee". The general scope of the definition is considered in section 4.113(b) of this subpart.

Section 4.152 Employees subject to prevailing compensation provisions of sections 2(a) (1) and (2)

Under sections 2(a) (1) and (2) of the Act minimum monetary wages and fringe benefits to be paid or furnished the various classes of service employees performing such contract work are determined by the Secretary of Labor or his authorized representative in accordance with prevailing rates and fringe benefits for such

employees in the locality and are required to be specified in such contracts and subcontracts thereunder. All service employees of the classes who actually perform the specific services called for by the contract (e.g. janitors performing on a contract for office cleaning; stenographers performing on a contract for stenographic reporting) are covered by the provisions specifying such minimum monetary wages and fringe benefits for such classes of service employees.

Section 4.153 Inapplicability of prevailing compensation provisions to some employees

There may be employees, used by a contractor or subcontractor in performing a service contract in excess of \$2,500 which is subject to the Act, whose services, although necessary to the performance of the contract, are not subject to minimum monetary wage or fringe benefit provisions contained in the contract pursuant to section 2(a). This may occur either because such employees do not come within the classes of service employees, directly engaged in performing the specified contract services, which are included in the Secretary's determinations of monetary wages and fringe benefits and for which such compensation is specified in the contract (an example might be a laundry contractor's billing clerk performing billing work with respect to the items laundered); or because the contract itself is exempted from the predetermined wage and fringe benefit requirements of section 2(a) (under the provisions of section 4.5) as a contract calling for services of classes of service employees with respect to whom there is no currently applicable wage or fringe benefit determination for the locality. In all such situations the employees, who are engaged in performing work on the contract but for whom no monetary minimum wage or fringe benefits are specified by its provisions, are nevertheless subject to the minimum wage provision of section 2(b) (see section 4.150) requiring payment of not less than the minimum wage specified under section 6(a) (1) of the Fair Labor Standards Act to all employees working on a covered contract, unless specifically exempt. The same is true in situations where minimum monetary wages and fringe benefits have not been specified in the contract for a

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particular class or classes of service employees because the wage and fringe benefit determinations applicable to the locality have been made only for other classes of service employees who will perform the contract work, and not for these. However, although wages lower than the specified Fair Labor Standards Act minimum may not be paid to such employees in classes omitted from those for which monetary wages or fringe benefits were predetermined and specified in the contract, the employer will be required to pay any higher monetary wages together with fringe benefits which may be specified for them pursuant to agreement of the interested parties as provided in section 4.6(b).

Section 4.154 Employees covered by sections 2(a) (3) and (4)

The safety and health standards of section 2(a) (3) (see section 4.186) and the notice requirements of section 2(a) (4) of the Act (see section 4.183) are applicable, in the absence of a specific exemption, to every service employee engaged by a contractor or subcontractor to furnish services under a contract subject to section 2(a) of the Act.

Section 4.155 Employee coverage does not depend on form of employment contract

The Act, in section 8(b), makes it plain that the coverage of service employees depends on whether their work for the contractor or subcontractor on a covered contract is that of a service employee as defined in section 8(b) and not on any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons.

Section 4.156 Employees in bona fide executive, administrative, or professional capacity

The term "service employee" as defined in Section 8(b) of the Act does not include persons employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR Part 541. Employees within the definition of service employee who are employed in an executive, administrative, or professional capacity are not excluded from

coverage, however, even though they are highly paid, if they fail to meet the tests set forth in 29 CFR Part 541. Thus, such employees as laboratory technicians, draftsmen, and air ambulance pilots, though they require a high level of skill to perform their duties and may meet the salary requirements of the regulations in Part 541 of this title, are ordinarily covered by the Act's provisions because they do not typically meet the other requirements of those regulations.

[42 FR 43065, Aug. 26, 1977]

COMPENSATION STANDARDS

Section 4.159 General minimum wage

The Act, in section 2(b) (1), provides generally that no contractor or subcontractor under any Federal contract subject to the Act shall pay any of his employees engaged in performing work on such a contract less than the minimum wage specified under section 6(a) (1) of the Fair Labor Standards Act. Section 2(a) (1) provides that the minimum monetary wage specified in any such contract exceeding \$2,500 shall in no case be lower than this Fair Labor Standards Act minimum wage. Section 2(b) (1) is a statutory provision which applies to the contractor or subcontractor without regard to whether it is incorporated in the contract; however, sections 4.6-4.7 provide for inclusion of its requirements in covered contracts and subcontracts. Because the statutory requirement specifies no fixed monetary wage rate and refers only to the minimum wage specified under section 6(a) (1) of the Fair Labor Standards Act, and because its application does not depend on provisions of the contract, any increase in such Fair Labor Standards Act minimum wage during the life of the contract is, on its effective date, also effective to increase the minimum wage payable under section 2(b) (1) to employees engaged in performing work on the contract. The minimum wage under section 6(a) (1) of the Fair Labor Standards Act is \$2.65 per hour beginning January 1, 1978, \$2.90 per hour beginning January 1, 1979, \$3.10 per hour beginning January 1, 1980, and \$3.35 per hour after December 31, 1980.

[43 FR 1491, January 10, 1978]

Section 4.160 Effect of section 6(e) of the Fair Labor Standards Act

Contractors and subcontractors performing work on contracts subject to the Service Contract Act are required to pay all employees, including those employees who are not performing work on or in connection with such contracts, not less than the general minimum wage standard provided in section 6(a) (1) of the Fair Labor Standards Act, as amended (Pub. L. 95-151).

[43 FR 1492, Jan. 10, 1978]

Section 4.161 Minimum monetary wages under contracts exceeding \$2,500

The standards established pursuant to the Act for minimum monetary wages to be paid by contractors and subcontractors under service contracts in excess of \$2,500 to service employees engaged in performance of the contract or subcontracts are required to be specified in the contract and in all subcontracts (see section 4.6). Section 2(a) (1) requires that every such contract (and any bid specification therefor) which is subject to the Act shall contain a "provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative, in accordance with prevailing rates for such employees in the locality, which in no case shall be lower than" the minimum wage specified under section 6(a) (1) of the Fair Labor Standards Act of 1938, as amended. If some or all of the determined wages in a contract fall below the level of the Fair Labor Standards Act minimum by reason of a change in that rate by amendment of the law, these rates become obsolete and the employer is obligated under section 2(b) (1) of the Service Contract Act, to pay the new minimum wage rate established by the amendment as of the date it becomes effective. A change in the Fair Labor Standards Act minimum by operation of law would also have the same effect on advertised specifications or negotiations for covered service contracts, i.e., it would make ineffective and would supplant any lower rate or rates included in such specifica-

tions or negotiations whether or not determined. However, unless affected by such a change in the Fair Labor Standards Act minimum wage or by contract changes necessitating the insertion of new wage provisions (see sections 4.143-4.145), the minimum monetary wage rate specified in the contract for each of the classes of service employees for which wage determinations have been made under section 2(a) (1) will continue to apply throughout the period of contract performance. No change in the obligation of the contractor or subcontractor with respect to minimum monetary wages will result from the mere fact that higher or lower wage rates may be determined to be prevailing for such employees in the locality after the award and before completion of the contract. Such wage determinations are effective for contracts not yet awarded, as provided in section 4.5(b).

Section 4.162 Fringe benefits under contracts exceeding \$2,500

(a) Section 2(a) (2) of the Act requires that every covered contract in excess of \$2,500 shall contain "a provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor."

(b) Under this provision, the fringe benefits, if any, which the contractor or subcontractor is required to furnish his service employees engaged in the performance of the contract are specified in the contract documents (see section 4.6). How he may satisfy this obligation is dealt with in sections 4.170-4.171 and in Subpart B of this part. A change in the fringe benefits required by the contract provision will not result

from the mere fact that other or additional fringe benefits are determined to be prevailing for such employees in the locality at a time subsequent to the award but before completion of the contract. Such fringe benefit determinations are effective for contracts not yet awarded (see section 4.5(b)), or in the event that changes in an existing contract requiring their insertion for prospective application have occurred (see sections 4.143-4.145).

Section 4.163 Locality basis of wage and fringe benefit determinations

Under section 2(a) of the Act, the Secretary or his authorized representative is given the authority to determine what minimum monetary wages and fringe benefits are prevailing for various classes of service employees "in the locality." The term "locality" has reference to geographic space. However, it has an elastic and variable meaning and, if the statutory purposes are to be achieved, must be viewed in the light of the existing wage structures which are pertinent to the employment by potential contractors of particular classes of service employees on the kinds of service contracts which must be considered, which are extremely varied. It is, accordingly, not possible to devise any precise single formula which would define the exact geographic limits of a "locality" that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. The locality within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts and circumstances pertaining to that determination. Each such determination applies only to contracts for the locality which it includes.

Section 4.164 Making the determinations and informing contractors

(a) *Information considered.* The minimum monetary wages and the fringe benefits set forth in determinations of the Secretary are based on information as to wage rates and fringe benefits in effect at the time the determination was made. The Department considers all pertinent information regarding prevailing wage rates and fringe benefits in the locality for the classes of

service employees for which determinations are made.

Such information may be derived from area surveys made by the Bureau of Labor Statistics or other Department personnel, from Government contracting officers, and from other available sources including employees and their representatives and employers and their associations. The determinations may be based on the wage rates and fringe benefits contained in union agreements where such have been determined to prevail in a locality for a specified occupational group.

(b) *Provision for consideration of currently prevailing wage rates and fringe benefits.* (1) Determinations will be reviewed periodically and where prevailing wage rates or fringe benefits have changed, such changes will be reflected in new determinations. In a locality where it is determined that the wage rate which prevails for a particular class of service employees is the rate specified in a collective bargaining agreement or agreements applicable in that locality, and such agreement or agreements specify increases in such rates to be effective on specific dates, the prior determinations would be modified to reflect such changes when they become effective, and the revised determinations would apply to contracts entered into after the modification.

(2) The regulations, in section 4.4, provide for the filing with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, by the awarding agency, prior to any invitation for bids or the commencement of negotiations for contracts exceeding \$2,500, of a notice of intention to make a service contract which is subject to the Act. Upon receipt of the notice that Office may make a determination of minimum monetary wages and fringe benefits for the classes of service employees who will perform on the contract or may revise a determination which is currently in effect.

(c) *Informing contractors of applicable determinations.* Contractors and subcontractors on contracts subject to the Act are apprised of the Secretary's determinations applicable at the time of the award by specification in the contract of the determined wage rates and fringe benefits. (See section 4.6(b)). A determination of prevailing wages or fringe benefits made after the date

of the contract award for classes of employees that will be used in performing the contract does not apply to the performance of the previously awarded contract. Prospective contractors are advised, in the invitations for bids or negotiation papers issued by the contracting agency, of the minimum monetary wages and fringe benefits required under the most recent applicable determinations of the Secretary for service employees who will perform the contract work. These requirements are, of course, the same for all bidders and none will be placed at a competitive disadvantage.

[33 FR 9880, July 10, 1968, as amended at 36 FR 287, Jan. 8, 1971; 43 FR 28467, June 30, 1978]

COMPLIANCE WITH COMPENSATION STANDARDS

Section 4.165 Wage payments and fringe benefits—in general

(a) (1) Monetary wages specified under the Act shall be paid to the employees to whom they are due, promptly following the end of the pay period in which they are earned. No deduction, rebate, or refund is permitted, except as hereinafter stated. The same rules apply to cash payments authorized to be paid with the statutory monetary wages as equivalents of determined fringe benefits (see Subpart B of this part).

(2) The Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage and fringe benefit determinations apply, in the absence of an express limitation, equally to all such service employees engaged in work subject to the Act's provisions.

(b) The Act does not prescribe the length of the pay period. However, for purposes of administration of the Act, and to conform with practices required under other statutes that may be applicable to the employment, wages and hours worked must be calculated on the basis of a fixed and regularly recurring workweek of seven consecutive 24-hour workday periods, and the records must be kept on this basis. It is appropriate to use this workweek for the pay period. A biweekly, semimonthly, or monthly pay period may, however, be used if agreed upon by the employer and his employees. A pay

period longer than 1 month is not recognized as appropriate for service employees and wage payments at greater intervals will not be considered as constituting proper payments in compliance with the Act.

(c) The prevailing rate established by a wage determination under the Act is a minimum rate. A contractor is not precluded from paying wage rates in excess of those determined to be prevailing in the particular locality. Nor does the Act affect or require the changing of any provisions of union contracts specifying higher monetary wages or fringe benefits than those contained in an applicable determination. However, if a determination for a class of service employees contains a wage or fringe benefit provision which is higher than that specified in an existing union agreement, the determination's provision will prevail for any work performed on a contract subject to the determination.

Section 4.166 Wage payments—unit of payment

The standard by which monetary wage payments are measured under the Act is the wage rate per hour. An hourly wage rate is not, however, the only unit for payment of wages that may be used for employees subject to the Act. Employees may be paid on a daily, weekly, or other time basis, or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis, will provide a rate per hour that will fulfill the statutory requirement. Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate. Failure to pay for certain hours at the required rate cannot be transformed into compliance with the Act by reallocating portions of payments made for other hours which are in excess of the specified minimum.

Section 4.167 Wage payments—medium of payment

The wage payment requirements under the Act for monetary wages specified under its provisions will be satisfied by the timely payment, finally and unconditionally or "free and

clear", of such wages to the employee either in cash or negotiable instrument payable at par. Scrip, tokens, credit cards, "dope checks", coupons, and similar devices which permit the employer to retain and prevent the employee from acquiring control of money due for the work until some time after the pay day for the period in which it was earned, are not proper mediums of payment under the Act. If, as is permissible, they are used as a convenient device for measuring earnings or allowable deductions during a single pay period, the employee cannot be charged with the loss or destruction of any of them and the employer may not, because the employee has not actually redeemed them, credit himself with any which remain outstanding on the pay day, in determining whether he has met the requirements of the Act. The employer may not include the cost of fringe benefits or equivalents furnished as required under section 2(a) (2) of the Act, as a credit toward the monetary wages he is required to pay under section 2(a) (1) or 2(b) of the Act (see section 4.51). However, the employer may include, as a part of the applicable minimum wage which he is required to pay under the Act, the reasonable cost or fair value, as determined by the Administrator, of furnishing an employee with "board, lodging, or other facilities" as defined in Part 531 of this title, in situations where such facilities are customarily furnished to employees and the employees' acceptance of them is voluntary and uncoerced. The determination of reasonable cost or fair value will be in accordance with the Administrator's regulations under the Fair Labor Standards Act, contained in such Part 531 of this title. While employment on contracts subject to the Act would not ordinarily involve situations in which service employees would receive tips from third persons, the treatment of tips for wage purposes in the situations where this may occur should be understood. For purposes of this Act, tips may be included in wages in accordance with the regulations under the Fair Labor Standards Act, contained in Part 531. The general rule under that Act is that the amount paid a tipped employee by his employer is deemed to be increased on account of tips by an amount determined by the employer, not in excess of 50 percent of the minimum wage applicable under

section 6 of that Act, through December 31, 1978, 45 percent effective January 1, 1979 and 40 percent effective January 1, 1980. In no event shall the sum credited be in excess of the value of tips actually received by the employee. Thus, the tip credit taken by an employer subject to the Service Contract Act may not exceed \$1.325 per hour beginning January 1, 1978, \$1.305 per hour beginning January 1, 1979, \$1.24 per hour beginning January 1, 1980 and \$1.34 per hour after December 31, 1980.

If the employer pays in full cents the \$1.325 figure must be rounded down to \$1.32 and the \$1.305 figure to \$1.30, in order that the employer will not be crediting more than the permissible percentage.

[33 FR 9880, July 10, 1968, as amended at 39 FR 14944, Apr. 29, 1974, and 43 FR 1492, Jan. 10, 1978]

Section 4.168 Wage payments—deductions from wages paid

The wage requirements of the Act will not be met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under the provisions of the Act and the regulations thereunder, or where the employee fails to receive such amounts free and clear because he "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to him. Authorized deductions are limited to those required by law, such as taxes payable by employees required to be withheld by the employer and amounts due employees which the employer is required by court order to pay to another; deductions allowable for the reasonable cost or fair value of board, lodging, and facilities furnished as set forth in section 4.167; and deductions of amounts which are authorized to be paid to third persons for the employee's account and benefit pursuant to his voluntary assignment or order or a collective bargaining agreement with bona fide representatives of employees which is applicable to the employer. Deductions for amounts paid to third persons on the employee's account which are not so authorized or are contrary to law from which the employer or any affiliate derives any profit or benefit directly or indirectly, may not be made

if they cut into the wage required to be paid under the Act. The principles applied in determining the permissibility of deductions for payments made to third persons are explained in more detail in sections 531.38-531.40 of this title.

Section 4.169 Wage payments—work subject to different rates

If an employee during a workweek works in different capacities in the performance of the contract and two or more rates of compensation under section 2 of the Act are applicable to the classes of work which he performs, he must be paid the highest of such rates for all hours worked in the workweek unless it appears from the employer's records or other affirmative proof which of such hours were included in the periods spent in each class of work. The rule is the same where such an employee is employed for a portion of the workweek in work not subject to the Act, for which compensation at a lower rate would be proper if the employer by his records or other affirmative proof, segregated the worktime thus spent.

Section 4.170 Furnishing fringe benefits or equivalents

(a) *General.* Fringe benefits specified under the Act shall be furnished, in addition to the specified monetary wages, by the contractor or subcontractor to employees engaged in performance of the contract, as provided in the determination of the Secretary or his authorized representative and prescribed in the contract documents, or, in the event that this is not possible or practicable, the obligation to furnish such benefits "may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary." (Act, section 2(a) (2).) The governing rules and regulations for furnishing such equivalents are set forth in Subpart B of this part. The various fringe benefits listed in the Act are illustrative of those which may be found to be prevailing for service employees in a particular locality. The benefits which an employer will actually be required to furnish employees performing on a specific contract will

be specified in the contract documents. When an employer has not made any provisions for fringe benefits, he cannot offset an amount of monetary wages paid in excess of the wages required under the determination, in order to satisfy his fringe benefit obligations under the Act. Also, the furnishing to the employee of items the cost or value of which is creditable toward the monetary wages specified under the Act, such as board, lodging, and other facilities in the situations described in section 4.167, may not be used to offset any fringe benefits specified in the contract.

(b) *Meeting the requirements, in general.* A contractor may dispose of certain of his fringe benefit obligations, such as pension, retirement, or health insurance benefits, which may be required by an applicable determination, by irrevocably paying the required contributions for fringe benefits to a trustee or third person pursuant to an existing bona fide fund, plan, or program. Where such a plan or fund does not exist, a contractor must discharge his obligation relating to fringe benefits by furnishing either an equivalent combination of bona fide fringe benefits or by making equivalent payments in cash to the employee, as authorized by the regulations in Subpart B of this part. When a contractor or subcontractor substitutes fringe benefits not specified in the contract for fringe benefits which are so specified, the substituted fringe benefits, like those for which the contract provisions are prescribed, must be "bona fide fringe benefits." No benefit required by Federal, State, or local law is a "bona fide" fringe benefit for purposes of the Act. No contribution toward fringe benefits made by the employees themselves, or fringe benefits provided from monies withheld from the employees' wages, or benefits statutorily required of the contractor or subcontractor (such as unemployment compensation, workers' compensation, or social security) may be included in satisfying any fringe benefit requirement under the Act. Also, the furnishing of facilities which are primarily for the benefit or convenience of the employer or the cost of which is properly a business expense of the employer is not the furnishing of a "bona fide fringe benefit." This would be true of such items, for example, as tools and other materials and services incidental to the employer's

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performance of the contract and the carrying on of his business, and the cost of uniforms and of their laundering where the nature of the work he has contracted to perform requires the employee to wear a uniform.

[33 FR 9880, July 10, 1968, as amended at 43 FR 28467, June 30, 1978]

Section 4.171 Meeting requirements for particular fringe benefits

(a) *Determinations specifying amount of fringe benefit* Where a fringe benefit determination specifies the amount of the employer's contribution to provide the benefit, the amount specified is the actual amount that must be provided by the employer for the employee. Thus, if prevailing fringe benefits for insurance or retirement are determined in a stated amount, and the employer provides such benefits through contributions in a lesser amount, he will be required to furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefits which he provides. Unless otherwise specified in the particular wage determination, every employee performing on a covered contract must be furnished the fringe benefits required by that determination for all hours spent working on that contract. Where a fringe benefit determination has been made requiring employer contributions for a specified fringe benefit in a stated amount per hour, a contractor employing his regular employees part of the time on contract work and part of the time on other work may credit against the hourly amount required for the hours spent on the contract work the proportionate part of a weekly, monthly, or other amount contributed by him for such fringe benefits or equivalent benefits for such employees. If, for example, the determination requires health and welfare benefits in the amount of 10 cents an hour and the employer provides hospitalization insurance for such employees at a cost of \$3.50 a week, the employer may credit 8.75 cents an hour toward his fringe benefit obligation to an employee who, in a particular workweek, works 35 hours on the contract work and 5 hours on other work. He cannot, however, allocate the entire \$3.50 to the

35 hours spent on contract work and take credit for 10 cents per hour in that manner.

(b) *Determinations not specifying monetary amount of fringe benefit.* (1) Where a fringe benefit determination provides for a stated number of paid holidays per year, and the contractor does not give the applicable time off for holidays occurring during the period of contract performance to temporary or casual employees, he would be required to pay such employees an equivalent amount in cash or in the form of other fringe benefits proportionate to their period of employment. The amount of such additional payment could be reduced to an hourly basis through the application of an equitable formula, as provided in section 4.53(e).

(2) Some questions have been raised about the application of provisions appearing in some fringe benefit determinations which call for "1 week paid vacation after 1 year of service with a contractor or successor." To determine when an employee meets the "after 1 year of service" test, an employer must take two factors into consideration: (i) the total length of time an employee has been in the employer's service, including both the time he has been performing on regular commercial work and the time he has been performing on the Government contract itself, and (ii) the total length of time an employee has been employed either by the present contractor or predecessor contractors in the performance of similar work on the same base. If an employee has a year of service under either the first or second consideration, he is eligible for 1 week's vacation with pay. For example, if a contractor has an employee who has worked for him for 2 years on regular commercial work and only for 6 months on a Government service contract, that employee would be eligible for the vacation since his total service with the employer adds up to more than 1 year. Similarly, if a contractor has an employee who worked for 2 years under a janitorial service contract on a particular base for two different predecessor contractors, and only 8 months with the present employer, that employee would also be considered as meeting the "after 1 year of service" test and would thus be eligible for the specified vacation. Work performed before, as well as after, a pertinent wage

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determination is issued must be counted in determining an employee's length of service.

(3) Where, however, a fringe benefit determination requires 1 week's paid vacation per year after 1 year's service with an employer, no employee, temporary or permanent, with less than 1 year's service with the contractor, whether or not he was working on the contract, would qualify for this benefit.

Section 4.172 Computations of hours worked

Since employees subject to the Act are entitled to the minimum compensation specified under its provisions for each hour worked in performance of a covered contract, a computation of their hours worked in each workweek when such work under the contract is performed is essential. Determinations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in Part 785 of this title. In general, the hours worked by an employee include all periods in which he is suffered or permitted to work whether or not he is required to do so, and all time during which he is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. The hours worked which are subject to the compensation provisions of the Act are those in which the employee is engaged in performing work on contracts subject to the Act; however, unless such hours are adequately segregated, as indicated in section 4.173, compensation in accordance with the Act will be required for all his hours of work in any workweek in which he performs any work in connection with the contract, because it will be presumed in the absence of affirmative proof to the contrary that such work continued throughout the workweek.

Section 4.173 Identification of contract work

Contractors and subcontractors under contracts subject to the Act are required to comply with its compensation requirements throughout the period of performance on the contract and to do so with respect to all employees who in any workweek are engaged in performing work on such contracts. If such a contractor during any workweek is not exclusively engaged in performing such contracts, or if while so en-

gaged he has employees who spend a portion but not all of their worktime in the workweek in performing work on such contracts, it is necessary for him to identify accurately in his records, or by other means, those periods in each such workweek when he and each such employee performed work on such contracts. In cases where contractors are not exclusively engaged in Government contract work, and there are adequate records segregating the periods in which work was performed on contracts subject to the Act from periods in which other work was performed, the compensation specified under the Act need not be paid for hours spent on non-contract work. However, in the absence of records adequately segregating non-covered work from the work performed on or in connection with the contract, all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the contrary is presented. Similarly, in the absence of such records, an employee performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. Even where a contractor can segregate Government from non-Government work, it is necessary that he comply with the requirements of section 6(e) of the FLSA discussed in section 4.160.

OVERTIME PAY OF COVERED EMPLOYEES

Section 4.180 Overtime pay—in general

The Act does not provide for compensation of covered employees at premium rates for overtime hours of work. Section 6 recognizes however, that other Federal laws may require such compensation to be paid to employees working on or in connection with contracts subject to the Act (see section 4.181) and prescribes, for purposes of such laws, the manner in which fringe benefits furnished pursuant to the Act shall be treated in computing such overtime compensation, as follows: "In determining any overtime pay to which such

service employees are entitled under any Federal law, the regular or basic hourly rate of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(e) thereof." Fringe benefit payments which qualify for such exclusion are described in Part 778, Subpart C of this title. The interpretations there set forth will be applied in determining the overtime pay to which covered service employees are entitled under other Federal statutes. The effect of section 6 of the Act in situations where equivalent fringe benefits or cash payments are provided in lieu of the specified fringe benefits (see section 4.170) is stated in section 4.55 of Subpart B of this part, and illustrated in section 4.182.

Section 4.181 Overtime pay provisions of other Acts

(a) *Fair Labor Standards Act.* Although provision has not been made for insertion in Government contracts of stipulations requiring compliance with the Fair Labor Standards Act, contractors and subcontractors performing contracts subject to the McNamara-O'Hara Service Contract Act may be required to compensate their employees working on or in connection with such contracts for overtime work pursuant to the overtime pay standards of the Fair Labor Standards Act. This is true with respect to employees engaged in interstate or foreign commerce or in the production of goods for such commerce (including occupations and processes closely related and directly essential to such production) and employees employed in enterprises which are so engaged, subject to the definitions and exceptions provided in such Act. Such employees, except as otherwise specifically provided in such Act, must receive overtime compensation at a rate of not less than $1\frac{1}{2}$ times their regular rate of pay for all hours worked in excess of the applicable standard in a workweek. See Part 778 of this title. However, the Fair Labor Standards Act provides no overtime pay requirements for employees, not within such interstate commerce coverage of the Act, who are subject to its minimum wage provisions only by virtue of the provisions of section 6(e), as explained in section 4.160.

(b) *Contract Work Hours and Safety Standards Act.* (1) The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332) applies generally to Government contracts, including service contracts in excess of \$2,500, which may require or involve the employment of laborers and mechanics. Guards, watchmen, and many other classes of service employees are laborers or mechanics within the meaning of such Act. However, employees rendering only professional services, seamen, and as a general rule those whose work is only clerical or supervisory or nonmanual in nature, are not deemed laborers or mechanics for purposes of the Act. The wages of every laborer or mechanic for his performance of work on such contracts must include compensation at a rate not less than $1\frac{1}{2}$ times his basic rate of pay for all hours worked in any workweek in excess of 40 or in excess of eight on any calendar days therein, whichever is the greater number of overtime hours. Exemptions are provided for transportation and communications contracts, contracts for the purchase of supplies ordinarily available in the open market, and work required to be done in accordance with the provisions of the Walsh-Healey Act.

(2) Regulations concerning this Act are contained in Part 5, and section 5.14(c) of this subtitle permits overtime pay to be computed in the same manner as under the Fair Labor Standards Act, subject of course to the differences in computations required by reason of the daily overtime provision of the Contract Work Hours and Safety Standards Act, which has no counterpart in the Fair Labor Standards Act.

(3) Although the application of the Contract Work Hours and Safety Standards Act does not depend on inclusion of its requirements in provisions physically made part of the contract, the regulations of the Secretary require such provisions to be set forth in contract clauses. (See section 5.5(c) of this subtitle.)

(c) *Walsh-Healey Public Contracts Act.* As pointed out in section 4.122, while some Government contracts may be subject both to the McNamara-O'Hara Service Contract Act and to the Walsh-Healey Public Contracts Act, the employees performing work on the contract which is subject to the latter Act are, when so engaged, exempt from the provisions of the

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former. They are, however, subject to the overtime provisions of the Walsh-Healey Act if, in any workweek, any of the work performed for the employer is subject to such Act and if, in such workweek, the total hours worked by the employee for the employer (whether wholly or only partly on such work) exceed 40 hours in the workweek or 8 hours in any day therein. In any such workweek the Walsh-Healey Act requires payment of overtime compensation at a rate not less than 1½ times the employee's basic rate for such weekly or daily overtime hours, whichever are greater in number. The overtime pay provisions of the Walsh-Healey Act are discussed in greater detail in the Rulings and Interpretations issued under such Act, copies of which are available from any office of the Wage and Hour Division, U.S. Department of Labor.

[33 FR 9880, July 10, 1968, as amended at 43 FR 28467, June 30, 1978]

Section 4.182 Overtime pay of service employees entitled to fringe benefits

Reference is made in section 4.180 to the rules prescribed by section 6 of the Act and Subpart B of this part which permit exclusion of certain fringe benefits and equivalents provided pursuant to section 2(a) (2) of the Act from the regular or basic rate of pay when computing overtime compensation of a service employee under the provisions of any other Federal law. As provided in section 4.55 of Subpart B, not only those fringe benefits excludable under section 6 as benefits determined and specified under section 2(a) (2), but also equivalent fringe benefits and cash payments authorized under Subpart B to be furnished in lieu of the specified benefits may be excluded from the regular or basic rate of such an employee. The application of this rule may be illustrated by the following examples:

(a) The A company pays a service employee \$4.50 an hour in cash under a wage determination which requires a monetary rate of not less than \$4 and a fringe benefit contribution of 50 cents which would qualify for exclusion from the regular rate under section 7(e) of the Fair Labor Standards Act. The contractor pays the 50 cents in cash because he made no contribu-

tions for fringe benefits specified in the determination and the contract. Overtime compensation in this case would be computed on a regular or basic rate of \$4 an hour.

(b) The B company has for some time been paying \$4.25 an hour to a service employee as his basic cash wage plus 25 cents an hour as a contribution to a welfare and pension plan, which contribution qualifies for exclusion from the regular rate under the Fair Labor Standards Act. For performance of work under a contract subject to the Act a monetary rate of \$4 and a fringe benefit contribution of 50 cents (also qualifying for such exclusion) are specified because found to be prevailing for such employees in the locality. The contractor may credit his 25-cent welfare and pension contribution toward the discharge of his fringe benefit obligation under the contract and make an additional contribution of 25 cents for the specified or equivalent fringe benefits or pay the employee an additional 25 cents in cash, as authorized in Subpart B of this part. These contributions or equivalent payments may be excluded from the employee's regular rate, which remains \$4.25, the rate agreed upon as the basic cash wage.

(c) The C company has been paying \$4 an hour as its basic cash wage on which the firm has been computing overtime compensation. For performance of work on a contract subject to the Act the same rate of monetary wages and a fringe benefit contribution of 50 cents an hour (qualifying for exclusion from the regular rate under the Fair Labor Standards Act) are specified in accordance with a determination that these are the monetary wages and fringe benefits prevailing for such employees in the locality. The contractor is required to continue to pay at least \$4 an hour in monetary wages and at least this amount must be included in the employee's regular or basic rate for overtime purposes under applicable Federal law. His fringe benefit obligation under the contract would be discharged if 50 cents of the contributions for fringe benefits were for the fringe benefits specified in the contract or equivalent benefits as defined in Subpart B of this part. He may exclude such fringe benefit contributions from the regular or basic rate of pay of the service employee in computing overtime pay due. Exclusion of the

remainder of the fringe benefit contributions from the regular rate under the Fair Labor Standards Act would depend on whether they are contributions excludable under section 7(e) of that Act.

[43 FR 1493, Jan. 10, 1978]

NOTICE TO EMPLOYEES

Section 4.183 Employees must be notified of compensation required

The Act, in section 2(a) (4), and the regulations thereunder in section 4.6(e), require all contracts subject to the Act which are in excess of \$2,500 to contain a clause requiring the contractor or subcontractor to notify each employee commencing work on a contract to which the Act applies of the compensation required to be paid such employee under section 2(a) (1) and the fringe benefits required to be furnished under section 2(a) (2). A notice form provided by the Wage and Hour Division is to be used for this purpose. It may be delivered to the employee or posted as stated in section 4.184.

Section 4.184 Posting of notice

Posting of the notice provided by the Wage and Hour Division shall be in a prominent and accessible place at the worksite, as required by section 4.6(e). The display of the notice in a place where it may be seen by employees performing on the contract will satisfy the requirement that it be in a "prominent and accessible place". Should display be necessary at more than one site, in order to assure that it is seen by such employees, additional copies of the poster may be obtained without cost from the Division. The contractor or subcontractor is required to attach to the poster a listing of all minimum monetary wages and fringe benefits, as specified in the contract, to be paid or furnished to the classes of service employees performing on the contract.

RECORDS

Section 4.185 Recordkeeping requirements

The records which a contractor or subcontractor is required to keep concerning employment

of employees subject to the Act are specified in section 4.6(g) of Subpart A of this part. They are required to be maintained for 3 years from the completion of the work, and must be made available for inspection and transcription by authorized representatives of the Administrator. Such records must be kept for each service employee performing work under the contract, for each workweek during the performance of the contract. If the required records are not separately kept for the service employees performing on the contract, it will be presumed, in the absence of affirmative proof to the contrary, that all service employees in the department or establishment where the contract was performed were engaged in covered work during the period of performance. (See section 4.173.)

SAFETY AND HEALTH PROVISIONS

Section 4.186 Contract requirements for safety and health of workers

The Act, in section 2(a) (3), requires every service contract in excess of \$2,500 subject to its provisions to contain a stipulation that "no part of the services covered by this Act will be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the contractor or any subcontractor which are unsanitary or hazardous or dangerous to the health or safety of a service employee engaged to furnish to services". Regulations under this provision are set forth in Part 1925 of this title.

ENFORCEMENT

Section 4.187 Recovery of underpayments

(a) The Act, in section 3(a) provides that any violation of any of the contract stipulations required by section 2(a) (1) or (2) or of section 2(b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayments of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay

such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) The Act, in section 5(b), provides that, if the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on the order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within 3 years shall be covered into the Treasury of the United States as miscellaneous receipts.

Section 4.188 Ineligibility for further contracts when violations occur

Section 5 of the Act directs the Comptroller General to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found violated this Act. Unless the Secretary otherwise recommends, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the name of such persons or firms. This prohibition against the award of a contract to an ineligible contractor applies to him in the capacity of either a prime contractor or a subcontractor.

Section 4.189 Administrative proceedings relating to enforcement of labor standards

The Secretary is authorized, pursuant to the provisions of section 4(a) of the Act, to hold hearings and make such decisions based upon findings of fact as are deemed to be necessary to

enforce the provisions of the Act. The Secretary's findings of fact after notice and hearing are declared to be conclusive upon all agencies of the United States and, if supported by a preponderance of the evidence, conclusive in any court of the United States. Rules of practice for administrative proceedings under this authority are set forth in Part 6 of this subtitle.

Section 4.190 Contract cancellation

As provided in section 3 of the Act, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

Section 4.191 Complaints and compliance assistance

(a) Any employer, employee, labor or trade organization, or other interested person or organization may report to any office of the Wage and Hour Division (or to any office of the Occupational Safety and Health Administration, in instances involving the safety and health provisions), a violation, or apparent violation of the act, or of any of the rules or regulations prescribed thereunder. Such offices are also available to assist or provide information to contractors or subcontractors desiring to ensure that their practices are in compliance with the act. Information furnished is treated confidentially.

(b) A report of breach or violation relating solely to safety and health requirements may be in writing and addressed to the Regional Administrator of an Occupational Safety and Health Administration Regional Office, U.S. Department of Labor, or to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210.

(c) Any other report of breach or violation may be in writing and addressed to the Assistant Regional Administrator of a Wage and Hour Division's regional office, U.S. Department of Labor, or to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210.

(d) In the event that an Assistant Regional Administrator for the Wage and Hour Division, Employment Standards Administration, is notified of a breach or violation which also involves safety and health standards, the Regional Administrator of the Employment Standards Administration shall notify the appropriate Regional Administrator of the Occupational Safety and Health Administration who shall with respect to the safety and health violation take action commensurate with his responsibilities pertaining to safety and health standards.

(e) The report should contain the following:

(1) The full name and address of the person or organization reporting the breach or violations.

(2) The full name and address of the person against whom the report is made.

(3) A clear and concise statement of the facts constituting the alleged breach or violation of any of the provisions of the McNamara-O'Hara Service Contract Act, or of any of the rules or regulations prescribed thereunder.

[33 FR 9880, July 10, 1968, as amended at 43 FR 28467, June 30, 1978]

U S GOVERNMENT PRINTING OFFICE: 1978-281-412:129

APPENDIX G-2

29 CFR Part 1910 contains the Occupational Safety and Health Standards. It totals 786 pages and because of the great volume, will not be included in this guide. It is recommended that a copy of this reference be obtained and understood.

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overtime under the Fair Labor Standards Act, the Contract Work Hours and Safety Standards Act, and the Walsh-Healey Public Contracts Act whenever the overtime provisions of any of these statutes apply concurrently with the Davis-Bacon Act or its related prevailing wage statutes. It is clear from the legislative history that in no event can the regular or basic rate upon which premium pay for overtime is calculated under the aforementioned Federal statutes be less than the amount determined by the Secretary of Labor as the basic hourly rate (i.e. cash rate) under section 1(b)(1) of the Davis-Bacon Act. (See S. Rep. No. 963, p. 7.) Contributions by employees are not excluded from the regular or basic rate upon which overtime is computed under these statutes; that is, an employee's regular or basic straight-time rate is computed on his earnings before any deductions are made for the employee's contributions to fringe benefits. The contractor's contributions or costs for fringe benefits may be excluded in computing such rate so long as the exclusions do not reduce the regular or basic rate below the basic hourly rate contained in the wage determination.

(b) The legislative report notes that the phrase "contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program" was added to the bill in Committee. This language in essence conforms to the overtime provisions of section 7(d)(4) of the Fair Labor Standards Act, as amended. The intent of the committee was to prevent any avoidance of overtime requirements under existing law. See H. Rep. No. 308, p. 5.

(c)(1) The act permits a contractor or subcontractor to pay a cash equivalent of any fringe benefits found prevailing by the Secretary of Labor. Such a cash equivalent would also be excludable in computing the regular or basic rate under the Federal overtime laws mentioned in paragraph (a). For example, the W construction contractor pays his laborers or mechanics \$3.50 in cash under a wage determination of the Secretary of Labor which requires a basic hourly rate of \$3 and

a fringe benefit contribution of 50 cents. The contractor pays the 50 cents in cash because he made no payments and incurred no costs for fringe benefits. Overtime compensation in this case would be computed on a regular or basic rate of \$3.00 an hour. However, in some cases a question of fact may be presented in ascertaining whether or not a cash payment made to laborers or mechanics is actually in lieu of a fringe benefit or is simply part of their straight time cash wage. In the latter situation, the cash payment is not excludable in computing overtime compensation. Consider the examples set forth in paragraphs (c)(2) and (3) of this section.

(2) The X construction contractor has for some time been paying \$3.25 an hour to a mechanic as his basic cash wage plus 50 cents an hour as a contribution to a welfare and pension plan. The Secretary of Labor determines that a basic hourly rate of \$3 an hour and a fringe benefit contribution of 50 cents are prevailing. The basic hourly rate or regular rate for overtime purposes would be \$3.25, the rate actually paid as a basic cash wage for the employee of X, rather than the \$3 rate determined as prevailing by the Secretary of Labor.

(3) Under the same prevailing wage determination, discussed in paragraph (c)(2) of this section, the Y construction contractor who has been paying \$3 an hour as his basic cash wage on which he has been computing overtime compensation reduces the cash wage to \$2.75 an hour but computes his costs of benefits under section 1(b)(2)(B) as \$1 an hour. In this example the regular or basic hourly rate would continue to be \$3 an hour. See S. Rep. No. 963, p. 7.

PART 6—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS ENFORCING LABOR STANDARDS IN FEDERAL SERVICE CONTRACTS

See

- 6.1 Applicability of rules.
- 6.2 Definitions.

PREHEARING PROCEDURES

- 6.3 Complaints.
- 6.4 Answer
- 6.5 Motions and requests

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Subtitle A—Office of the Secretary of Labor

§ 6.4

- 6.1
- 6.2 Consent findings and order.
- 6.3 Prehearing conferences.

HEARINGS AND RELATED MATTERS

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- 6.15 Hearing examiners.
- 6.16 Computation of time.

AUTHORITY: Sec. 4, 79 Stat. 1035; 5 U.S.C. 551, 41 U.S.C. 353; 86 Stat. 790, 41 U.S.C. 354(a).

SOURCE: 32 FR 6133, Apr. 19, 1967, unless otherwise noted.

§ 6.1 Applicability of rules.

This part provides the rules of practice for administrative proceedings relating to the enforcement of labor standards in the Service Contract Act of 1965 (79 Stat. 1035). See Part 4 of this subtitle.

§ 6.2 Definitions.

As used in this part:

(a) "Hearing examiner" means an administrative law judge appointed as provided in 5 U.S.C. 3105 and Subpart H of Part 930 of Title 5 of the Code of Federal Regulations (see 37 FR 16787) and qualified to preside at hearings under 5 U.S.C. 557.

(b) "Chief Hearing Examiner" means the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. 20210.

(c) "Respondent" means the contractor, subcontractor, or affiliate (in which a contractor or subcontractor is alleged to have a substantial interest) against whom the proceedings are brought.

(d) "The Act" means the Service Contract Act of 1965 as amended (79 Stat. 1034, 86 Stat. 789, 31 U.S.C. 351 et seq.).

(e) "Administrator" means the Deputy Assistant Secretary for Employment Standards in the Employment Standards Administration of the Department of Labor who is also Administrator of the Wage and Hour Division, or his authorized representative as set forth in this part.

(f) "Associate Solicitor in charge of litigation" means the Associate Solicitor for General Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, D.C. 20210.

[37 FR 25473, Nov. 30, 1972]

PREHEARING PROCEDURES

§ 6.3 Complaints.

(a) Enforcement proceeding may be instituted by the Deputy Solicitor, or Regional Solicitors/Regional Attorneys by issuing a complaint and causing the complaint to be served upon the respondent.

(b) *Contents.* The complaint shall contain a clear and concise factual statement sufficient to inform the respondent with reasonable definiteness of the acts or practices he is alleged to have committed in violation of the Act or his contractual obligation.

(c) *Amendments.* At any time prior to the close of the hearing, the complaint may be amended in the discretion of the hearing examiner and on such terms as he may approve.

(d) *Notice of hearing.* The hearing examiner shall notify the parties of the time and place for a hearing within 10 days after the service of the complaint.

[32 FR 61, 3, Apr. 19, 1967, as amended at 43 FR 6944, Feb. 17, 1978]

§ 6.4 Answer.

(a) *Filing and service.* Within 14 days after the service of the complaint, the respondent shall file an answer with the Chief Hearing Examiner. The answer shall be signed by the respondent or his attorney.

(b) *Contents; failure to file.* The answer shall (1) contain a statement of the facts which constitute the grounds of defense, and shall specifically admit, explain, or deny, each of the allegations of the complaint unless the respondent is without knowledge, in

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which case the answer shall so state; or (2) state that the respondent admits all of the allegations of the complaint. The answer may contain a waiver of hearing. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

(c) *Procedure upon admission of facts.* The admission, in the answer or by failure to file an answer, of all the material allegations of fact contained in the complaint shall constitute a waiver of hearing. Upon such admission of facts, the hearing examiner without further hearing shall prepare his decision in which he shall adopt as his proposed findings of fact the material facts alleged in the complaint. The parties shall be given an opportunity to file exceptions to his decision, and to file briefs in support of the exceptions.

§ 6.5 Motions and requests.

Motions or requests shall be filed with the Chief Hearing Examiner, except that those made during the course of the hearing shall be filed with the hearing examiner or shall be stated orally and made part of the transcript. Each motion or request shall state the particular order, ruling, or action desired, and the grounds therefor. The hearing examiner is authorized to rule upon all motions or requests filed or made prior to the filing of his report.

§ 6.6 Consent findings and order.

(a) *General.* At any time after the issuance of a complaint and prior to the reception of evidence in any proceeding, the respondent may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the hearing examiner, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached

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which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) A waiver of any further procedural steps before the hearing examiner and the Administrator; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement to the hearing examiner for his consideration; or

(2) Inform the hearing examiner that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the hearing examiner, within 30 days thereafter, shall accept such agreement by issuing his decision based upon the agreed findings.

132 FR 6133, Apr. 19, 1967, as amended at 36 FR 287, Jan. 8, 1971]

§ 6.7 Prehearing conferences.

(a) Upon his own motion or the motion of the parties, the hearing examiner may direct the parties or their counsel to meet with him for a conference to consider:

(1) Simplification of the issues;

(2) Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitation;

(3) Stipulations, admissions of fact and of contents and authenticity of documents;

(4) Limitation of the number of expert witnesses; and

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(5) Such other matters as may tend to expedite the disposition of the proceeding.

(b) The record shall show the matters disposed of by order and by agreement in such pretrial conferences. The subsequent course of the proceeding shall be controlled by such action.

HEARINGS AND RELATED MATTERS

§ 6.8. Appearances.

(a) *Representation.* The parties may appear in person, by counsel, or otherwise.

(b) *Failure to appear.* In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present shall have an election to present his evidence in whole or such portion thereof sufficient to make a prima facie case before the hearing examiner. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the hearing examiner's decision and to file exceptions thereto.

§ 6.9. Hearing.

(a) *Order of proceeding.* Except as may be determined otherwise by the hearing examiner, counsel supporting the complaint shall proceed first at the hearing.

(b) *Evidence—(1) In general.* The testimony of witnesses shall be upon oath or affirmation administered by the hearing examiner and shall be subject to such cross-examination as may be required for a full and true disclosure of the facts. The hearing examiner shall exclude evidence which is immaterial, irrelevant, or unduly repetitious.

(2) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, he shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made before the hearing examiner may be relied upon subsequently in the proceeding.

(3) *Exceptions.* Formal exception to an adverse ruling is not required.

(c) *Official notice.* Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice and also concerning which the Department by reason of its functions is presumed to be expert: *Provided,* That the parties shall be given adequate notice, at the hearing or by reference in the hearing examiner's decision of the matters so noticed, and shall be given adequate opportunity to show the contrary.

(d) *Transcript.* Hearings shall be stenographically reported. Copies of the transcript may be obtained by the parties upon written application filed with the reporter, and upon the payment of fees at the rate provided in the agreement with the reporter.

DECISION AND ORDER

§ 6.10. Decision of the hearing examiner.

(a) *Proposed findings of fact, conclusions, and order.* Within 10 days after receipt of notice that the transcript of the testimony has been filed or such additional time as the hearing examiner may allow, each party may file with the hearing examiner proposed findings of fact, conclusions of law, and order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the hearing examiner.* Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and order, or after submission of an agreement containing consent findings and order, the hearing examiner shall make his decision, which shall become the final decision in the administrative process 20 days after service thereof unless exceptions are filed thereto as provided in § 6.12. The decision of the hearing examiner shall include a statement of findings and conclusions, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. If the respondent is found to have violated the Act, the hearing examiner in his decision shall make a recommendation to

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The Secretary of Labor as to whether the respondent should be relieved from the application of the ineligible list as provided in section 5(a) of the Act. If liquidated damages are found due and are unpaid, no recommendation for relief shall be made except on condition that the liquidated damages are paid. The decision shall also include an appropriate order (excluding such issue of ineligibility). The decision of the hearing examiner shall be based upon a consideration of the whole record, including any administrative admissions made under § 6.6. It shall be supported by reliable, probative, and substantial evidence and be made upon the bases of a preponderance of that evidence. Any recommendation that the respondent be relieved by the Secretary of Labor from the ineligible list provision under section 5(a) of the Act as amended shall be supported by a finding of the unusual circumstances, within the meaning of such section, which are relied upon as a reason for the recommendation.

[32 FR 6133, Apr. 19, 1967, as amended at 37 FR 25474, Nov. 30, 1972]

§ 6.11 Exceptions.

Within 20 days after the date of the decision of the hearing examiner, any party aggrieved thereby may file exceptions thereto with supporting reasons. Such party shall transmit his exceptions in writing to the Chief Hearing Examiner, referring to the specific findings of fact, conclusions of law, or order excepted to, the specific pages of transcript relevant to the suggestions, and suggesting corrected findings of fact, conclusions of law, or order.

§ 6.12 Relief from ineligible list.

(a) Application for relief from the ineligible list provisions under section 5(a) of the Act may be filed by the respondent with the Secretary of Labor within 20 days from the date of service of the hearing examiner's decision or Administrator's decision, as the case may be. Notice of the determination of the Secretary on the application of the ineligible list provision of the Act shall be served upon the parties.

(b) Any application filed by respondent for relief from the ineligible list

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provision shall state the unusual circumstances to be considered by the Secretary of Labor in determining whether to recommend such relief. The Secretary shall forward to the Comptroller General the name of any respondent found in violation of the Act within 90 days after the decision of the hearing examiner, finding such violation, becomes final unless the Secretary within such period decides that relief from the ineligible list provision will be recommended because of unusual circumstances.

[36 FR 287, Jan. 8, 1971, as amended at 37 FR 25474, Nov. 30, 1972]

§ 6.13 Transmission of Record.

If exceptions are filed, the hearing examiner shall transmit the record of the proceeding to the Administrator. The record shall include: The pleadings, motions, and requests filed in written form, rulings thereon, the transcript of the testimony and proceeding taken at the hearing, together with the exhibits admitted in evidence, any documents or papers filed in connection with prehearing conferences, such proposed findings of fact, conclusions of law, orders, and supporting reasons, as may have been filed, the hearing examiner's decision and such exceptions, statements of objections, and briefs in support thereof as may have been filed in the proceeding.

[36 FR 287, Jan. 8, 1971]

§ 6.14 Decisions and order of the Administrator.

If exceptions to the decision of the hearing examiner are taken as provided in this part, the Administrator shall upon consideration thereof, together with the record references and authorities cited in support thereof, make his decision, which shall affirm, modify, or set aside, in whole or part, the findings, conclusions, and order contained in the decision of the hearing examiner, and shall include a statement of reasons or bases for the actions taken. With respect to the findings of fact, the Administrator shall modify or set aside only those findings that are clearly erroneous.

Copies of the decision and order shall be served upon the parties. Any such decision shall treat any question of recommendation for relief from the ineligible list under section 5(a) of the Act to the same extent and subject to the same limitations as provided in § 6.10(b) concerning decisions of the hearing examiner.

136 FR 287, Jan. 8, 1971

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§ 6.15 Service; copies of documents and pleadings.

(a) *Manner of service.* Service upon any party shall be made by the party filing the pleading or document by delivering a copy or mailing a copy to the last known address. If the person upon whom service is made by mail resides 500 miles or more from the party effecting service, such mailing must be by airmail. When a party is represented by an attorney, the service should be upon the attorney.

(b) *Proof of service.* A certificate of the person serving the pleading or other document by personal delivery or by mailing, setting forth the manner of said service shall be proof of the service.

(c) *Service upon Department.* Number of copies of pleading or other documents. An original and three copies of all pleadings and other documents shall be filed with the Department of Labor, the original with the officer before whom the case is pending (hearing examiner, chief hearing examiner, Administrator, or the Secretary of Labor) and the copies with the attorney representing the Department during the hearing or the Associate Solicitor in charge of litigation.

32 FR 6133, Apr. 19, 1967, as amended at 16 FR 287, Jan. 8, 1971

§ 6.16 Witnesses and fees.

Witnesses subpoenaed by any party shall be paid the same fees and mileage as are paid for like services in the District Court of the United States. The witness fees and mileage shall be paid by the party at whose instance the witnesses appear.

§ 6.17 Depositions.

(a) *When, how, and by whom taken.* For good cause shown, the testimony of any witness may be taken by deposition in any proceeding, when a complaint has been filed, whether at issue or not. Depositions may be taken orally or upon written interrogatories before any person designated by the hearing examiner and having power to administer oaths.

(b) *Application.* Any party desiring to take the deposition of a witness shall make application in writing to the hearing examiner, setting forth the reasons why such desposition should be taken; the time when, the place where, and the name and post office address of the person before whom the deposition is to be taken; the name and address of each witness; and the subject matter concerning which each witness is expected to testify.

(c) *Notice.* Such notice as the hearing examiner shall order shall be given for the taking of a deposition, but this shall not be less than 5 days' written notice when the deposition is to be taken within the United States and not less than 20 days' written notice when the deposition is to be taken elsewhere.

(d) *Taking and receiving in evidence.* Each witness testifying upon deposition shall be sworn, and the adverse party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, read to the witness, subscribed by him, and certified by the officer. Thereafter, the officer shall seal the deposition, with two copies thereof, in an envelope and mail the same by registered mail to the hearing examiner. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by the party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof. No part of a deposition shall be admitted in evi-

dence unless there is a showing that the reasons for the taking of the deposition in the first instance exist at the time of hearing.

§ 6.18 Subpoenas.

All applications for subpoenas ad testificandum and subpoenas duces tecum shall be made in writing to the hearing examiner. Application for subpoenas duces tecum shall specify as exactly as possible the documents to be produced, showing their general relevancy and reasonable scope.

§ 6.19 Hearing examiners.

(a) *Who presides.* All hearings shall be presided over by a hearing examiner appointed under section 11 of the Administrative Procedure Act.

(b) *How assigned.* The presiding hearing examiner shall be designated by the Chief Hearing Examiner.

(c) *Powers.* Hearing examiners shall have all powers necessary to the conduct of fair and impartial hearings, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpoenas upon proper applications as provided in this § 6.18;

(3) To rule upon offers of proof and receive relevant evidence;

(4) To take or cause to be taken depositions and to determine their scope;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel therein;

(6) To hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) To consider and rule upon procedural requests;

(8) To make and file decisions in conformity with this part;

(9) To take any action authorized by the rules in this part or in conformance with the Administrative Procedure Act.

(d) *Consultation.* The hearing examiner shall not consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate.

(e) *Disqualification of hearing examiners.* (1) When a hearing examiner deems himself disqualified to preside in a particular proceeding, he shall

withdraw therefrom by notice on the record directed to the Chief Hearing Examiner.

(2) Whenever any party shall deem the hearing examiner for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the Chief Hearing Examiner a motion to disqualify and remove such hearing examiner, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. The Chief Hearing Examiner shall rule upon the motion.

(f) *Contemptuous conduct; failure or refusal of a witness to appear or answer.* Contemptuous conduct at any hearing before a hearing examiner shall be ground for exclusion from the hearing. The failure or refusal of a witness to appear at any hearing or to answer any question which has been ruled to be proper shall be ground for the action provided in section 5 of the Act of June 30, 1936 (41 U.S.C. 39) and, in the discretion of the hearing examiner, for striking out all or part of the testimony which may have been given by such witness.

(32 FR 6133, Apr. 19, 1967, as amended at 36 FR 287, Jan. 8, 1971)

§ 6.20 Computation of time.

Saturdays, Sundays, and holidays shall be included in computing the time allowed for filing any document or paper under this part, but when such time expires on such a day, such period shall be extended to include the next following day which is not such a day.

PART 7—PRACTICE BEFORE WAGE APPEALS BOARD

Subpart A—Purpose and Scope

Sec.

7.1 Purpose and scope.

Subpart B—Review of Wage Determinations

7.2 Who may file petitions for review

7.3 Where to file

7.4 When to file

7.5 Contents of petitions

7.6 Filing of wage determination record

7.7 Presentations of other interested persons

CONTRACTOR INDUSTRIAL LABOR RELATIONS

Part 10—Service Contract Act of 1965,
As Amended

12-1000 Scope of Part. This part sets forth policies and procedures for implementing the provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended (41 U.S.C. 351 et seq.) and the provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.), as they pertain to service contracts, and the regulations prescribed in 29 CFR, Parts 4 and 1910, and instructions issued by the Secretary of Labor.

12-1001 Statutory Requirements. The Service Contract Act, referred to in this part as the "Act," includes the following general requirements with respect to service contracts entered into by Federal agencies.

- (i) Regardless of contract amount, no contractor or subcontractor holding a Federal service contract shall pay any of its employees engaged in such work less than the minimum wage specified in the Fair Labor Standards Act of 1938, as amended;
- (ii) Successor contractors performing on contracts in excess of \$2,500 must pay wages and fringe benefits at least equal to those agreed upon for substantially the same services in any bona fide collective bargaining agreement entered into by the predecessor contractor (unless such wages and fringe benefits are determined to be substantially at variance with those which prevail for services of a similar character in the locality);
- (iii) Service contractors performing on contracts in excess of \$2,500, to which no predecessor contractor's collective bargaining agreement applies, shall pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act; and
- (iv) See 12-1002.4 for statutory exemptions and 12-1002.5 for regulatory exemptions.

12-1002. Applicability.

12-1002.1 General. Subject to statutory exemptions or administrative exemptions by the Secretary of Labor under section 4(b) of the Act (41 U.S.C. 353), the Act applies to all Federal contracts, the principal purpose of which is to furnish services in the United States through the use of service employees. (Note: In contracts having separate and severable requirements for supplies and services, the principal purpose test is applied to the service requirement,

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thereby possibly bringing it within the Act's coverage.

12-1002.2 *Applicability of the Act.* The Act applies to service contracts performed within the United States (see 12-1002.3(ii)). The Act does not apply to contracts performed outside the United States.

12-1002.3 *Definitions.* For the purpose of this part, unless otherwise indicated, terms used here are defined as follows:

(i) "Service employee" means any person employed in connection with a contract entered into by the United States and not exempted under section 7 of the Act (41 U.S.C. 356), whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR, Part 541); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(ii) "United States" shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands, as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.), American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any U.S. base or possession within a foreign country.

(iii) "Administrator" means the Administrator of the Wage and Hour Division, United States Department of Labor, or the Administrator's authorized representative.

(iv) "Contract" includes any contract subject wholly or in part to provisions of the Act and any subcontract at any tier thereunder.

(v) "Contractor" includes a subcontractor whose subcontract is subject to provisions of the Act.

(vi) "Wage Determination" includes any determination of minimum wage rates or fringe benefits made pursuant to the provisions of section 2(a) and 4(c) of the Act (41 U.S.C. 351 and 353) for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of \$2,500 that is subject to the provisions of the Act.

12-1002.4 *Statutory Exemptions.* Statutory exemptions are set forth in paragraph (p) of the clause at 7-1903.41(a).

12-1002.5 *Administrative Limitations, Variations, Tolerances, and Exemptions.* The Secretary of Labor, only in special circumstances, may provide such reasonable limitations

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and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of the Act as the Secretary may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business (41 U.S.C. 353(b)).

Requests for variations, tolerances, and exemptions from the Act shall be submitted in writing through contracting channels to the departmental labor advisor (12-1002.6).

12-1002.6 *Questions Concerning Applicability of the Act.* In the event the contracting officer questions the applicability of the Act to an acquisition, the matter shall be forwarded for resolution, prior to issuance of the solicitation, as follows:

For the Army: Assistant Secretary of the Army (RDA)
Attn: Labor Advisor

For the Navy: Chief of Naval Material
Attn: Labor Relations Advisor

For the Air Force: Chief, Air Force Labor Relations
HQ USAF/RDC

For DCA: Defense Communications Agency Headquarters
Attn: Counsel

For DMA: Staff Director of Logistics

For DNA: Deputy Director of Operations and Administration

For DLA: Deputy Director (Contract Administrative Services)
Attn: DLA-HP

12-1003 Department of Labor Regulations. The Department of Labor has issued 29 CFR, Parts 4 and 1910, providing for the administration and enforcement of the Act. The regulations include coverage of the following matters relating to the requirements of the Act:

- (i) Service Contract Labor Provisions and Procedures (see 29 CFR, Subpart A, Part 4);
- (ii) Equivalents of Determined Fringe Benefits (see 29 CFR, Subpart B, Part 4);
- (iii) Application of the Act of 1965 (Rulings and Interpretations) (see 29 CFR, Subpart C, Part 4);
- (iv) Safe and Sanitary Working Conditions (see 29 CFR, Part 1910); and
- (v) Rules of Practice for Administrative Proceedings Enforcing Service Contract Labor Standards (see 29 CFR, Part 6).

12-1004 Contract Clauses and Solicitation Provisions. Clauses, solicitation provisions, and guidance as to their use are contained at:

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- (i) 7-1903.41(a) - Service Contracts in Excess of \$2,500;
- (ii) 7-1903.41(b) - Service Contracts Not in Excess of \$2,500;
- (iii) 7-1903.41(c) - Basic Ordering Agreements and Blanket Purchase Agreements;
- (iv) 7-1903.41(d) - Price Adjustment Clause;
- (v) 7-1903.41(e) - Potential Application of the Act to Overhaul and Modification Work;
- (vi) 7-2003.84 - Statement of Rates for Federal Hires;
- (vii) 7-2003.85 - SCA Minimum Wages and Fringe Benefits Applicable to Successor Contractor Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA).

12-1005 Administration and Enforcement.

12-1005.1 *Responsibilities of the Department of Labor.* The Secretary of Labor is authorized and directed to administer and enforce the provisions of the Act, to make rules and regulations, issue orders, make decisions, and take other appropriate action under the Act.

12-1005.2 *Contracting Officer Responsibilities—Preparation of Solicitations and Contracts.*

(a) As to solicitations and contracts of \$2,500 or less, to which the Act applies, the contracting officer shall include the clause set forth in 7-1903.41(b).

(b) As to solicitations and contracts that are or may be in excess of \$2,500, to which the Act applies, the contracting officer shall insert the applicable clause(s) at 7-1903.41 and solicitation provision(s) at 7-2003.84 and 7-2003.85, and shall take the following appropriate actions:

(1) *Issuance of Notice of Intention to Make a Service Contract—Standard Forms 98 and 98a.*

a. No less than 30 days prior to issuance of any solicitation or commencement of negotiations for any new contract, contract extension, bilateral modification adding significant new work, or exercise of an option exceeding \$2,500, which may be subject to the Act, the contracting office shall file with the Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. To avoid delays because of late issuance of wage determinations by the Department of Labor in response to the notice, the contracting office shall make every effort to file its notice as early as possible. This notice shall be submitted on SF 98/98a (see Appendix E-100.98) in accordance with the forms' instructions and shall be supplemented by the information required under i. and c. below. Care should be taken to insure that all required

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information is provided to avert return without action by the Department of Labor.

b. The contracting office shall file SF 98a with SF 98. SF 98a shall contain the following information concerning the service employees expected to be employed by the contractor and any subcontractors in performing the contract:

- (i) classes of service employees;
- (ii) the number of service employees in each class; and
- (iii) the wage rate that would be paid each class if employed by the agency and subject to the wage provisions of 5 U.S.C. 5341 or 5332 (see (3) below).

c. If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor whose contract the proposed contract will succeed, and if the incumbent contractor is furnishing such services through the use of service employees whose wages and fringe benefits are the subject of one or more collective bargaining agreements, the contracting officer shall obtain from the contractor (see paragraph (n) of 7-1903.41(a)) a copy of each such collective bargaining agreement, together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement, and submit them with the SF 98/98a, retaining a copy for the contract file. If such services are being furnished for more than one location and the collectively bargained wage rates and fringe benefits are different for different locations or do not apply to all locations, the contracting officer shall identify the locations to which the agreements have application. See (2) below for notice to interested parties, which is required at least 30 days prior to issuance of the solicitation. See also (4)b. below, concerning collective bargaining agreements that are considered not to be entered into as a result of arms-length negotiations or that are at substantial variance with the wages and fringe benefits prevailing in the locality.

d. If exceptional circumstances prevent the filing of the notice of intention and the supplemental information required by b. above, the notice shall be submitted to the Wage and Hour Division as soon as practicable, with a detailed explanation justifying the need for expeditious action on the SF 98.

e. Requests to expedite issuance of wage determinations or to check the status of a particular request

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should be made in accordance with departmental procedures through the offices listed in 12-1002.6. Direct contact with Department of Labor officials for this purpose is not authorized.

(2) *Notice to Interested Parties.* If, pursuant to paragraph (n) of the clause set forth at 7-1903.41(a) or through other means, the contracting officer is aware or has reason to believe that the incumbent contractor or a subcontractor is negotiating or has consummated a collective bargaining agreement with a bargaining agent representing service employees performing on the contract, both the contractor and bargaining agent(s) shall be notified of the pending acquisition at least 30 days prior to (i) issuance of the solicitation, or (ii) the commencement of performance of contract modification extending the initial period of performance or affecting the scope of effort or of an option. Such notification shall be made by registered letter, return receipt requested, and shall set forth all pertinent dates.

(3) *Statement of Equivalent Rates for Federal Hire.*

a. The provision at 7-2003.84 shall be inserted in each solicitation for the acquisition of services to which the clause at 7-1903.41(a) applies. In accordance with this provision, the solicitation shall contain a statement of rates for equivalent Federal hire, setting forth those wage rates and fringe benefits that would be paid by the contracting activity to the various classes of service employees expected to be utilized under the contract if 5 U.S.C. 5332 (General Schedule—white collar) and/or 5 U.S.C. 5341 (Wage Board—blue collar) were applicable.

b. Procedures for computation of these rates are as follows:

1. Wages paid blue collar employees shall be the basic hourly rate for each class. The rate shall be Wage Board pay schedule step two for nonsupervisory service employees and step three for supervisory service employees. Determinations of applicable Wage Board rates are as follows:

i. Where the place of performance is known, the rates applicable to that location shall be used; or
ii. Where the place of performance is not known, the rates applicable to the contracting activity's location shall be used.

2. Wages paid white collar employees shall be an hourly rate for each class. The rate shall be obtained by dividing the general pay schedule step one biweekly rate by 80.

3. Local civilian personnel offices can assist in determining and providing grade and salary data.

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4. The Department of Labor develops standardized fringe benefits. The approved standard and any subsequent modification thereto shall be published in the Defense Acquisition Circular.

(4) *Applicability of Wage Determinations Prior to Award.*

a. Solicitations and contracts for more than \$2,500 shall contain an attachment (wage determination or appropriate revisions thereto) issued by the Administrator in response to the notice required under (1) above, setting forth the minimum wages and fringe benefits for service employees to be employed thereunder. However, wage determinations and revisions thereto shall not apply—

- (i) where no collective bargaining agreement exists and wage determinations or revisions are received by the Federal agency less than 10 days before the opening of bids or date established for the initial receipt of proposals, unless the contracting officer finds that there is a reasonable time to notify bidders or offerors thereof; or
- (ii) where a collective bargaining agreement does exist and (A) the contracting agency has received notice of the existence thereof less than 10 days before bid opening or commencement of performance of a negotiated contract, option, or contract extension, and (B) the contracting officer determines that there is not reasonable time to incorporate a new wage determination in the solicitation, and (C) the notices required by (1) and (2) above have been given.

b. *Review of Collective Bargaining Agreements and Wage Determinations.*

1. If a contracting officer believes that an incumbent contractor's collective bargaining agreement under section 4(c) of the Act was not entered into as a result of arms-length negotiations, procedures in accordance with 4. below shall be followed.

2. Immediately upon receipt of a wage determination not predicated upon a collective bargaining agreement, the contracting officer shall examine the wage determination to ascertain whether it is correct and whether it conforms with the wages and fringe benefits prevailing for services of

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a character similar in the locality. If the wage determination is at substantial variance with the prevailing rates, the contracting officer shall proceed in accordance with 5. below.

3. A full statement of the facts shall be transmitted immediately to the departmental labor advisor (see 12-1002.6) through contracting channels for appropriate action.

4. If wages and fringe benefits provided for in a collective bargaining agreement are substantially at variance with those prevailing for services of a character similar in the locality, the contracting officer shall proceed as follows:

i. Review immediately the agreement to ascertain if a hearing (12-1006) is warranted.

ii. Submit a request for hearing, when warranted, to the departmental labor advisor (12-1002.6) through contracting channels. Sufficient payroll data shall accompany this request to support a *prima facie* showing that the bargained-for rates, in fact, are substantially at variance with those prevailing for services of a character similar in the locality. Except under extraordinary circumstances, as determined by the Administrator, a request for hearing shall not be considered by the Secretary unless received by the Department of Labor more than 10 days before the award of an advertised contract or prior to the commencement of a negotiated contract or contract extension, through option or otherwise.

(5) *Late Receipt of Wage Determinations.*

a. If the SCA wage determination requested in accordance with (1) above is not received in time for inclusion in the solicitation, and absent an incumbent contractor union agreement, the contracting officer should proceed using the latest wage determination included in the existing contract, if any. If a new wage determination is subsequently received 10 or more days prior to the opening of bids or the date established for the initial receipt of proposals, the solicitation must be amended accordingly. However, if a new wage determination is received less than 10 days before the opening of bids or the date established for the initial receipt of proposals, it shall be included in the solicitation only when there is a reasonable time to notify offerors thereof, pursuant to (4)a.(1) above.

b. In those cases involving an incumbent contractor operating under a collective bargaining agreement, the wage determination in the incumbent's contract shall not

CONTRACTOR INDUSTRIAL LABOR RELATIONS

be included in any solicitation that must be released without a new SCA wage determination. Instead, using the solicitation provisions at 7-2003.85, offerors shall be informed that—

- (i) the economic terms of such agreement(s) will apply to the contract and should be considered in developing an offer; however,
- (ii) pursuant to Department of Labor regulations at 29 CFR 4.1c, and subject to the conditions set forth in (2) and (4)*a.ii.* above, the economic terms of any agreement entered into subsequent to this solicitation might apply to the contract.

c. The contracting officer shall notify in writing the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, of each case when compelled to proceed without a new wage determination due to a delayed response from the Department of Labor. An information copy of each such notice shall be forwarded to the appropriate departmental labor advisor (see 12-1002.6).

12-1005.3 *Applicability of Wage Determinations—Subsequent to Award.* If a required wage determination is not included in the solicitation or contract due to failure to comply with 12-1005.2(b)(1) or (2), and if the contracting officer receives a wage determination from the Department of Labor within 30 days of the late filing of the SF 98/98a or the discovery by the Department of Labor of the failure to include a wage determination required by this part—

- (i) the contracting officer shall attempt to negotiate a bilateral notification to—
 - (A) incorporate the appropriate clauses, if not previously included;
 - (B) incorporate the required wage determination, which shall be effective as of the date of issuance unless otherwise specified; and
 - (C) equitably adjust the contract price to compensate for any increased cost of performance under the contract by the wage determination; or
- (ii) the contracting officer, if unable to negotiate a bilateral modification incorporating the wage determination, shall document the contract file to show the efforts made and provide a copy of this documentation through appropriate channels to the departmental labor advisor (see 12-1002.6).

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12-1005.4 *Additional Classes of Service Employees (Conformable Rates)*. Where additional classes of service employees are required, which were not set forth in the wage determination, the procedure described in paragraph (a) of the contract clause (7-1903.41(a)) shall be followed after award.

12-1005.5 *Notice of Award*.

(a) *Notice of Award of Contract—Standard Form 99*. Two copies of SF 99 shall be prepared for (i) contracts of \$2,500 or more but less than \$10,000, containing the clause in 7-1903.41(a); (ii) the initial order (if less than \$10,000) under an indefinite delivery-type contract or basic ordering agreement containing the clause in 7-1903.41(a); and (iii) the initial call under a blanket purchase agreement containing the clause in 7-1903.41(a). This form shall be forwarded to the Department of Labor, ATTN: Administrator, Wage and Hour Division, Washington, D.C. 20210. The form shall be completed as follows:

- (i) Item 1 through 7 and 12 and 13: self-explanatory;
- (ii) Item 8: enter the notation "Service Contract Act";
- (iii) Item 9: leave blank;
- (iv) Item 10: (A) enter the notation "Major Category" and indicate beside this entry the general service area into which the contract falls, and (B) enter the heading "Detailed Description" and, following this entry, describe in detail the services to be performed; and
- (v) Item 11: enter the dollar amount of the contract or the estimated dollar value with the notation "estimated" (if the exact amount is not known). If neither the exact nor the estimated dollar value is known, enter "indefinite" or "not to exceed \$ _____."

(b) *Individual Procurement Action Report (DD Form 350)*.

Awards of service contracts of \$10,000 or more and orders of \$10,000 or more under indefinite delivery-type contracts and basic ordering agreements are reported to the Department of Labor by the Office of the Secretary of Defense from information contained in this form (see 21-114). Therefore, the contracting officer shall not report such awards directly to the Department of Labor.

12-1005.6 *Inquiries Concerning the Act*. Contractors or contractor employees who inquire concerning the administration and enforcement of the Act shall be advised that such matters fall within the jurisdiction of the Department of Labor and shall be given the address of the appropriate

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Assistant Regional Administrator of the Wage and Hour Division of the Department of Labor (see 12-607).

12-1005.7 *Contract Modifications.*

(a) *Bilateral Contract Modifications.* Generally, a bilateral contract modification affecting the scope of the work is regarded as a new contract for purposes of the Act. (Bilateral contract modifications not related to the contract's labor requirements or containing insignificant changes to the contract's labor requirements shall not be deemed to create a new contract for purposes of the Act.) Prior to entering into such modification, the contracting officer shall forward SF 98/98a to the Administrator in accordance with the procedure set forth in 12-1005.2(b)(1), except that—

- (i) in the "Estimated Solicitation Date" block, enter the date the wage determination is needed; and
- (ii) in block 6, enter "Modification of Existing Contract for (describe type of service) Services."

(b) *Extension of Contract Through Exercise of Option or Otherwise.* A new contract shall be deemed entered into for purposes of the Act when the period of performance of an existing contract is extended pursuant to an option clause or otherwise. Prior to extending the period of performance of the contract, the contracting officer shall forward SF 98/98a as provided in 12-1005.2(b)(1) and in (a) above.

12-1005.8 *Multiyear Contracts.* After the initial submission of the SF 98/98a, the contracting officer shall submit an SF 98/98a on an annual basis at least 30 days prior to the anniversary date on all multiyear contracts subject to the Act (see paragraph (c) of 7-1903.41(a)).

12-1005.9 *Withholding of Contract Payments.*

(a) As provided by the Act, any violation of the stipulations required by the clauses (7-1903.41) renders the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of the contract. Upon the written request of the Department of Labor, at a level no lower than an Assistant Regional Administrator, so much of the accrued payment due on the contract under which the violations occurred shall be withheld as is necessary to pay such employees under that contract or under any other contract between the Government prime contractor and the Federal Government, provided such other contract is not assigned pursuant to 31 U.S.C. 203 or 41 U.S.C. 15. Generally, such sums withheld shall be forwarded immediately to the Department of Labor for payment to employees unless otherwise directed by the Department of Labor.

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CONTRACTOR INDUSTRIAL LABOR RELATIONS

12-1005.10 *Termination.* See paragraph (i) of 7-1903.41(a).

12-1005.11 *Cooperation with the Department of Labor.* The contracting officer shall cooperate with representatives of the Department of Labor in the examination of records, interviews with service employees, and all other aspects of investigations undertaken by the Department of Labor. When requested, agencies shall furnish to the Administrator any available information with respect to contractors, sub-contractors, their contracts, and the nature of the contract services. Violations apparent to the contracting agency and complaints received shall be promptly referred in writing to the appropriate regional office of the Department of Labor. In no event shall complaints by employees be disclosed to the employer.

12-1006 *Hearings.* A successor contractor's obligation (see 12-1001(ii)) cannot be avoided unless it is found after a hearing that such bargaining for wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality. Such hearings may be requested by any interested party, including the contractor, a union, or the contracting agency.

12-1007 *Procedures for Evaluating Professional Employee Compensation for Service Contracts.*

12-1007.1 *Purpose.* The Service Contract Act of 1965, as amended, was enacted to ensure that blue collar and some white collar workers are fairly compensated by contractors providing contract services to the Government. It does not apply, however, to professional employees. This subpart provides policies and procedures to be used when contracting for services which include a meaningful number of professional employees not covered under the Service Contract Act.

12-1007.2 *Policy.* It is the policy of the Federal Government that all service employees, including professional employees, employed by contractors providing services to the U.S. Government be fairly and properly compensated.

12-1007.3 *Applicability.* The provisions in 7-2003.78 and 7-2003.79 shall apply when all of the following conditions are present:

- (i) the principal purpose of the proposed contract is to furnish services in the United States;
- (ii) the proposed contract will be negotiated;
- (iii) there are a meaningful number of professional employees who will be employed by the contractor to perform the service; and
- (iv) the proposed contract will be in excess of \$250,000.

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CONTRACTOR INDUSTRIAL LABOR RELATIONS

12-1007.4 *Definition of Professional Employee.* The term "professional" is not restricted to the traditional professions of law, medicine, and theology. It includes those professions that have a recognized status and that are based on the acquirement of professional knowledge through prolonged study. Title 29, Part 541, Code of Federal Regulations, defines the term "professional employee" and provides a listing of occupations generally considered to be held by professionals.

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ARMED SERVICES PROCUREMENT REGULATION

DEPARTMENT OF THE NAVY
NAVAL SYPPY SYSTEMS COMMAND
WASHINGTON, D.C. 20376

(dtd. 21 Jul 1980)

From: Commander, Naval Supply Systems Command

Subj: Consultant Service Contracts

Ref. (a) NAVSUP Ltr 021B/GB 4270.3 dtd 12 Dec 79
(b) DAR 21-109

Encl: (1) ASN (M,RA&L) Memo dtd 23 Nov 79; Subj: Reporting of
Consultant Type Services
(2) List of Contracts Coded "Consultant Type Services"

1. Reference (a) promulgated enclosure (1) which is a list of criteria to be used in determining if a contract should be coded a "consultant type service" on the DD-350, Block 9D. Enclosure (2) is a list of contracts which were designated "consultant type services" on DD-350s but which may have been improperly coded.

2. Addressees are requested to review their respective contracts listed on enclosure (2). If it is determined that any of these contracts are not for "consultant type services", as defined in enclosure (1), a corrected DD-350 shall be submitted to the Naval Material Command in accordance with reference (b).

3. Addressees with field management responsibilities are requested to disseminate enclosure (1) among NFCS activities under their cognizance with a view towards decreasing instances of miscoding in the future.

Dennis J. Fish
CAPT, SC, USN
Deputy Commander
Contracting Management

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DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(MANPOWER, RESERVE AFFAIRS AND LOGISTICS)
WASHINGTON, D.C. 20360

23 November 1979

MEMORANDUM FOR MAT O8C
ONR 600
MARCORPS (MC-LB)

Subj: Reporting of consultant type services

In order to expedite immediate implementation of action taken by the DAR Council on 16 November 1979, the Council has instructed the departments to distribute the following:

DD Form 350, Item 9D, and DAR 21-115.4.

Item 9D of DD Form 350 requires data on DOD prime contract awards for consultant type services. However, reviews of DD 350's reveal inconsistent and faulty reporting.

Therefore, for the purpose of the DD 350 reporting requirement, in order to achieve correct and uniform coding, consulting services means those services of a purely advisory nature relating to the governmental functions of agency administration and management and agency program management. Examples of services which are considered to be or not to be consulting services include, but are not limited to the following:

(1) Services Included

- (i) Advice on discriminatory practices in labor;
- (ii) Advice on organizational structure and management methods;
- (iii) Advice on artistic and cultural matters;
- (iv) Advice on and analysis of electric power projects;
- (v) Evaluation of the effectiveness of agency publications;
- (vi) Advice on mail handling procedures;
- (vii) Advice on plans for conducting census enumerations;
- (viii) Analysis of the impact of a program;

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- (ix) Advice on maritime labor policy and maritime market development;
 - (x) Advice on legal and technological problems in patent and trademark examinations;
 - (xi) Policy and program analysis evaluation and advice;
 - (xii) Services of grant peer review panelists.
- (2) Services Excluded:
- (i) Commercial and industrial products and services;
 - (ii) Conduct of research;
 - (iii) Performance of operating functions and supervision of those functions;
 - (iv) Automatic data processing/keypunching services;
 - (v) Information system development;
 - (vi) Audits made by Certified Public Accountants;
 - (vii) Architect and engineering services and other associated services directly related to a particular structure;
 - (viii) Purchase of real or personal property;
 - (ix) Stenographic services;
 - (x) Direct operation and management of Government-owned facilities;
 - (xi) Installation or testing of equipment;
 - (xii) Services performed by technicians or non-professional persons to meet unusual or peak work demands;
 - (xiii) Consultant-type services provided by one Federal entity for another Federal entity under a Memorandum of Understanding or similar arrangement;
 - (xiv) Physicians, dentists, nurses, and other health care professionals providing medical services;
 - (xv) Employee training and executive development;

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- (xvi) Legal research services that do not include advice or recommendations;
- (xvii) Editing and proofreading services;
- (xviii) Educational-vocational guidance counseling for veterans;
- (xix) Court reporting;
- (xx) Translation services;
- (xxi) Advisory services provided directly to the public or foreign governments as part of an agency's programs of assistance;
- (xxii) Geological, archeological, and cadastral surveys.

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Navy Policy Member
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SECTION XXII—SERVICE CONTRACTS

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SECTION XXII

SERVICE CONTRACTS

22-000 Scope of Section. This Section deals generally with the obtaining of services by contract, and specifically with certain types of contracts which can properly be classified as service contracts. It does not cover the services of individuals obtained by direct appointment or through normal Civil Service employment procedures, nor does it cover the obtaining of services by grant.

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Part 1—Service Contracts in General

22-101 Definition of Service Contract.

(a) A service contract is one which calls directly for a contractor's time and effort rather than for a concrete end product. For purposes of this definition, a report shall not be considered a concrete end product if the primary purpose of the contract is to obtain the contractor's time and effort and the report is merely incidental to this purpose.

(b) Service contracts as defined above are generally found in areas involving the following:

- (i) maintenance, overhaul, repair, servicing, rehabilitation, salvage, and modernization or modification of supplies, systems and equipment;
- (ii) maintenance, repair, rehabilitation, and modification of real property;
- (iii) architect-engineering (see Section XVIII);
- (iv) expert and consultant services;
- (v) the services of DoD-sponsored organizations;
- (vi) installation of equipment obtained under separate contract;
- (vii) operation of Government-owned equipment, facilities, and systems;
- (viii) engineering and technical services;
- (ix) housekeeping and base services;
- (x) transportation and related services;
- (xi) training and education;
- (xii) medical services;
- (xiii) photographic, printing and publication services;
- (xiv) mortuary services;
- (xv) communications services;
- (xvi) test services;
- (xvii) data processing;
- (xviii) warehousing;
- (xix) auctioneering;
- (xx) arbitration;
- (xxi) stevedoring; and
- (xxii) research and development (see Section IV).

22-102 Personal Services and Nonpersonal Services.

22-102.1 Policy.

(a) The Civil Service laws and regulations and the Classification Act lay down requirements which must be met by the Government in hiring its employees, and establish the incidents of employment. In addition, personnel ceilings have been established for the Department of Defense. Except as otherwise authorized by express statutory authority (*e.g.*, 5 U.S.C. 3109 as implemented by the annual Department of Defense Appropriation Act—expert and consultant services (see Part 2)), these laws and regulations shall not be circumvented through the medium of "personal services" contracting, which is the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Government. The Contracting Officer is responsible for assuring implementation of this policy by considering the criteria in 22-102.2 below be-

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fore entering into any service contract, and by obtaining a legal opinion in any doubtful case and in any case where express statutory authority for a personal service contract is to be invoked.

(b) "Nonpersonal Services." On the other hand, contracts for nonpersonal services, properly issued and administered, represent an approved resource for Department of Defense agencies in the accomplishment of their programs.

22-102.2 Criteria for Recognizing Personal Services. There are no definitive rules for characterizing particular services as "personal" or "nonpersonal." There are many factors involved, all of which are not of equal importance. The characterization of services in a particular case cannot be made by simply counting factors, but can only be the result of a balancing of all the factors in accordance with their relative importance. The following factors shall be considered, as well as any others which are relevant (some of the following factors include parenthetical explanations or qualifications which indicate the type of judgment that the contracting officer should exercise):

(i) the nature of the work:

- (A) to what extent the Government can obtain civil servants to do the job, or whether the contractor has specialized knowledge or equipment which is unavailable to the Government (this is a factor which might be useful in a doubtful case, but should not in its self create doubt about services which are otherwise clearly nonpersonal);
- (B) to what extent the services represent the discharge of a Governmental function which calls for the exercise of personal judgment and discretion on behalf of the Government (this factor, if present in a sufficient degree, may alone render the services personal in nature); and
- (C) to what extent the requirement for services to be performed under the contract is continuing rather than short-term or intermittent (this is a factor which might be useful in a doubtful case, but should not in its self create doubt about services which are otherwise clearly nonpersonal);

(ii) contractual provisions concerning the contractor's employees (in considering the following, it should be noted that supervision and control of the contractor or his employees, if present in a sufficient degree, may alone render the services personal in nature)—

- (A) to what extent the Government specifies the qualifications of, or reserves the right to approve, individual contractor employees (but granting or denying security clearance and providing for necessary health qualifications are always permissible controls over contractor employees; also, it is permissible to some extent to specify in the contract the technical and experience qualifications of contractor employees, if this is necessary to assure satisfactory performance);
- (B) to what extent the Government reserves the right to assign tasks to and prepare work schedules for contractor employees during performance of the contract (this does not preclude inclusion in

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the contract, at its inception, of work schedules for the contractor, or the establishment of a time of performance for orders issued under a requirements or other indefinite delivery-type contract);

- (C) to what extent the Government retains the right (whether actually exercised or not) to supervise the work of the contractor employees, either directly or indirectly;
 - (D) to what extent the Government reserves the right to supervise or control the method in which the contractor performs the service, the number of people he will employ, the specific duties of individual employees, and similar details (however, it is always permissible to provide in the contract that the contractor's employees must comply with regulations for the protection of life and property; also, it is permissible to specify a recommended, or occasionally even a minimum, number of people the contractor must employ, if this is necessary to assure performance—but in that event it should be made clear in the contract that this does not in any way minimize the contractor's obligation to use as many employees as are necessary for proper contract performance);
 - (E) to what extent the Government will review performance by each individual contractor employee, as opposed to reviewing a final product on an overall basis after completion of the work;
 - (F) to what extent the Government retains the right to have contractor employees removed from the job for reasons other than misconduct or security;
- (iii) other provisions of the contract—
- (A) whether the services can properly be defined as an end product;
 - (B) whether the contractor undertakes a specific task or project that is definable either at the inception of the contract or at some point during performance, or whether the work is defined on a day-to-day basis (however, this does not preclude use of a requirements or other indefinite delivery-type contract, provided the nature of the work is specifically described in the contract, and orders are formally issued to the contractor rather than to individual employees);
 - (C) whether payment will be for results accomplished or solely according to time worked (this is a factor which might be useful in a doubtful case, but should not in its self create doubt about services which are otherwise clearly nonpersonal); and
 - (D) to what extent the Government is to furnish the office or working space, facilities, equipment, and supplies necessary for contract performance (this is a factor which might be useful in a doubtful case, but should not in its self create doubt about services which are otherwise clearly nonpersonal); and

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(iv) administration of the contract—

- (A) to what extent the contractor employees are used interchangeably with Government personnel to perform the same functions;
- (B) to what extent the contractor employees are integrated into the Government's organizational structure; and
- (C) to what extent any of the elements in (ii) and (iii) above are present in the administration of the contract, regardless of whether they are provided for by the terms of the contract.

22-102.3 Examples of Personal Versus Nonpersonal Services. It is to be emphasized that the examples below are for illustrative purposes only and are not to be used as the basis for a determination in any specific case.

(a) *Personal.* The following are examples of personal services contracts.

- (i) contract for the furnishing of ordinary, day-to-day stenographic and secretarial services in a Government office under Government supervision exercised either directly or through a contractor supervisor, even if only for a peak work period of two weeks;
- (ii) contract for preparation of a staff type report on the operation of a particular Government office or installation, where no specialized skills are required and the report would ordinarily be prepared by the regular officers or employees of the office or installation even if there is to be no Government supervision and even if payment is to be for an "end product" report;
- (iii) contract for the furnishing of persons to perform the various day-to-day functions of contract administration for a Government agency, even if there is no Government supervision; and
- (iv) contract with an accounting firm to come in and perform day-to-day accounting functions for the Government.

(b) *Nonpersonal.* The following are examples of nonpersonal service contracts:

- (i) contract for field engineering work requiring specialized equipment and trained personnel unavailable to the Government but not involving the exercise of discretion on behalf of the Government, where the contractor performs work adequately described in the contract free of Government supervision;
- (ii) contract with an individual for delivery of lectures without Government supervision, at specific places, on specific dates, and on a specialized subject, even if payment is by the hour;
- (iii) contract for janitorial services, where the contract provides for specific tasks to be performed in specific places, free of Government direction, supervision, and control over the contractor's employees, at a fixed price for the work to be performed; and
- (iv) research and development contract, providing a fixed price for a level of effort, as long as the work is performed by the contractor independently of Government direction, supervision, and control.

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22-102.4 Determination by Contracting Officer; Documentation of Contract File.

(a) At the time the contracting officer receives, through a purchase request or other document, any requirement for the procurement of services, he shall determine whether the procurement is proper in the light of the personal services policy in 22-102. He shall not proceed without documenting the contract file with:

- (i) unless exempted by (b), a brief memorandum of his determination that the services are nonpersonal, together with his reasons and all the facts which bear on the personal-nonpersonal question, or a memorandum of his determination that procurement of the services is expressly authorized by statute, regardless of whether personal, and
- (ii) an opinion of counsel obtained pursuant to 22-102.1 in any doubtful case and in any case where express statutory authorization is invoked; and
- (iii) any further documentation which may be required by Departmental implementation.

(b) The following are exempted from the documentation requirements imposed by (a)(i):

- (i) contracts for construction and contracts for architect-engineering services for preparation of designs, plans, drawings and specifications awarded pursuant to Section XVIII procedures; and
- (ii) simplified small purchases issued pursuant to Section III, Part 6, procedures.

22-103 Competition in Service Contracting. The provisions of statute and of this Regulation requiring competition are fully applicable to service contracts. Therefore, unless otherwise provided by statute, contracts for services shall be awarded through formal advertising, whenever "feasible and practicable under the existing conditions and circumstances." When formal advertising is not feasible and practicable and negotiation is authorized, competition still must be obtained to the maximum practicable extent, except for procurements not in excess of \$500. The method of obtaining competition will vary with the type of service being procured, and will not necessarily be limited to price comparison alone.

22-104 Conflict of Interest in Service Contracting. In procuring services by contract, the applicable provisions with respect to conflicts of interest shall be observed (see 1-113 and Appendix G) and when required by those provisions, an appropriate conflict of interest clause shall be incorporated into the contract.

22-105 Small Business Certificate of Competency. In those service contracts where the highest competence obtainable is a requirement of the Government, the small business certificate of competency procedures may not be applicable (see 1-705.4(b)).

22-106 Service Contract Act of 1965. Implementation of the Service Contract Act of 1965 (P.L. 89-286), which provides for minimum wages and fringe benefits as well as other conditions of work under certain service contracts, is contained in Section XII, Part 10.

22-107 Contract Term.

(a) The term of a service contract that is funded by annual appropriations shall not extend beyond the end of the fiscal year current at the beginning of the contract term, unless the contract falls into one of the following categories

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- (i) a one-year contract for maintenance of tools or facilities if authorized under the current Department of Defense Appropriations Act;
 - (ii) a multi-year service contract within the coverage of 1-322.8;
 - (iii) a one-year requirements or indefinite quantity contract, as defined in 3-409.2 and 3-409.3, in which any specified minimum quantities are certain to be ordered in the fiscal year current at the beginning of the contract term (see 1-318); or
 - (iv) a contract for expert or consultant services entered into in accordance with 22-204.2, or for educational services, which cannot feasibly be subdivided for separate performance in each fiscal year.
- (b) Any contract entered into under the authority of (a)(iii) above shall contain the "Availability of Funds" clause in 7-104.91(b).

22-108 Prohibition Against Contracts With Detective Agencies. There is a statutory prohibition against entering into a contract with a detective agency or its employees regardless of the character of the contract services to be performed (5 U.S. Code 3108).

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Part 2—Procurement of Expert or Consultant Services

22-200 Scope of Part. This Part sets forth policy and procedures for the procurement by contract, pursuant to 5 U.S.C. 3109, of expert or consultant services (including stenographic reporting services) from individuals and from firms, regardless of whether personal. This Part does not govern employment of individual experts or consultants by excepted appointment; the requirements for such employment are set forth in personnel regulations of the Civil Service Commission and of the respective Departments.

22-201 Statutory Authority.

(a) Authority for the procurement by contract of expert and consultant services is found in 5 U.S.C. 3109, as implemented by annual appropriation acts or by other legislation. Most contracts for expert or consultant services are executed by the Departments pursuant to the authority contained in the General Provisions of the annual Department of Defense Appropriation Act.

(1) 5 U.S.C. 3109 provides:

“(a) For the purpose of this section—

(1) “agency” has the meaning given it by section 5721 of this title; and

(2) “appropriation” includes funds made available by statute under section 849 of title 31

(b) When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to—

(1) the provisions of this title governing appointment in the competitive service;

(2) chapter 51 and subchapter III of chapter 53 of this title; and

(3) section 5 of title 41, except in the case of stenographic reporting services by an organization.

However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title only when specifically authorized by the appropriation or other statute authorizing the procurement of the services.”

(2) Typical of the language which is enacted each year in the General Provisions of the Department of Defense Appropriation Act implementing 5 U.S.C. 3109 is section 601 of the Act of September 29, 1965 (P.L. 89-213; 79 Stat. 873), which provides:

“During the current fiscal year, the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force, respectively, if they should deem it advantageous to the national defense, and if in their opinions the existing facilities of the Department of Defense are inadequate, are authorized to procure services in accordance with section 15 of the Act of August 2, 1946 (5 U.S.C. 55a), under regulations prescribed by the Secretary of Defense, and to pay in connection therewith travel expenses of individuals, including actual transportation and per diem in lieu of subsistence while traveling from their homes or places of business to official duty station and return as may be authorized by law: *Provided*, That such contracts may be renewed annually.”

(b) Except in the case of stenographic reporting services, contracts with individuals or firms for expert and consultant services are usually negotiated, normally under the authority of 10 U.S.C. 2304 (a) (4), as implemented by 3-204.

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22-202 Definition of Experts and Consultants.

(a) The terms "experts" and "consultants" shall include those persons who are exceptionally qualified, by education or by experience, in a particular field to perform some specialized service.

(b) Stenographic reporting services are included in the term "expert or consultant services" for purposes of procurement by contract under this Part.

22-203 Policy.

(a) The proper use of experts and consultants is a legitimate and economical way to improve Government services and operations. Activities of the Departments can be strengthened by utilizing the highly specialized knowledge and skills of such individuals. Accordingly, the services of experts and consultants may be used at all organizational levels to help managers achieve maximum effectiveness and economy in their operations. However, experts and consultants shall not be used to perform duties which can be performed by regular employees, to fill positions which call for full-time continuing employees, or to circumvent competitive civil service procedures and Classification Act pay limits.

(b) The following are examples of services which may be procured from experts or consultants by contract:

- (i) specialized opinion unavailable in the Department;
- (ii) outside points of view, to avoid too limited judgment, on critical administrative or technical issues;
- (iii) advice on developments in industrial and other research;
- (iv) for especially important projects, opinions of noted experts which are highly important to the success of an undertaking;
- (v) the advisory participation of citizens to develop or implement *Government programs that by their nature or by statute call for citizen participation*;
- (vi) the services of specialists who are not needed full-time, who cannot serve regularly or full-time, or whose full-time employment is uneconomical to the Government.

22-204 Limitations on Use of Expert or Consultant Authority.

22-204.1 General. Obtaining the benefit of expert or consultant services by contract, pursuant to 5 U.S.C. 3109, is subject to the following limitations:

- (i) The employment of individual experts or consultants shall be by contract only when the services required cannot be obtained by excepted appointment in accordance with personnel regulations.
- (ii) The nature of the duties to be performed must be temporary (not more than one year) or intermittent (not cumulatively more than 130 days in one year). Accordingly, no contract shall be entered into for longer than one year at a time. (However, contracts may be renewed annually; see 22-212.)
- (iii) Procurement of the services must be advantageous to the national defense.
- (iv) Such services shall not be used when existing facilities of the particular Department are adequate or when personnel with the necessary skills can be obtained through normal civil service appointment procedures.
- (v) Procurement of such services by contract shall not be used as a means of circumventing manpower space ceilings.

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22-204.2 Contracts Crossing Fiscal Years. Because the implementing appropriation act authorizing the procurement of expert and consultant services expires and must be renewed each fiscal year (see 22-201), a contract under this authority shall not cross fiscal years—even in cases where funds could properly be obligated to a contract calling for services in parts of two fiscal years—unless it calls for an end product which cannot feasibly be subdivided for separate performances in each fiscal year. No contract shall cross fiscal years unless authorized to do so in accordance with 22-205(c)(viii). This paragraph shall apply equally to contracts with individuals and contracts with firms.

22-205 Authorization To Enter Into Contracts: "Determinations and Findings".

(a) All contracts to be entered into pursuant to 5 U.S.C. 3109 for expert or consultant services must be authorized in writing by a Determinations and Findings (D&F) signed in accordance with Departmental regulations. Ordinarily each contract shall be separately authorized. However, when the determinations can appropriately be made with respect to a class of contracts, the authorizing official may issue blanket authority for that class of contracts by signing a class D&F.

(b) Each D&F shall authorize a contract or class of contracts to be entered into during a stated period not to exceed one year, which ordinarily shall be within one fiscal year. A D&F may be issued during one fiscal year to authorize a contract or class of contracts to be entered into during the following fiscal year, provided the determinations are reasonably expected to hold true at the time the contract or contracts are to be entered into and provided that either the D&F is made contingent upon enactment of implementing legislation or implementing legislation for the next fiscal year has already been enacted.

(c) Each D&F shall contain the following:

- (i) a brief description of the services authorized to be procured, including for individual D&Fs the estimated time of performance and the estimated cost;
- (ii) determination by the authorizing official with respect to the particular contract or class of contracts that:
 - (A) the duties to be performed are of a temporary or intermittent nature;
 - (B) procurement of the services is advantageous to the national defense;
 - (C) the existing facilities of his Department are inadequate to furnish the services;
 - (D) it is not feasible to obtain personnel with the necessary skills through normal civil service appointment procedures; and
 - (E) any other determination required by the statutes under the authority of which the procurement is made;
- (iii) a citation of statutory authority, namely 5 U.S.C. 3109 and (except where (vii) below, is applicable) appropriate implementing legislation; the latter may be the current annual Department of Defense Appropriation Act, a current temporary Department of Defense appropriation enactment, or other appropriate legislation;

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- (iv) a grant of authority to procure the required services and, if desired, to renew the contract;
- (v) the condition that the necessary funds must be available for obligation;
- (vi) the condition that no contract may be entered into for longer than one year at a time;
- (vii) an added condition, in cases where the D&F covers a period for which implementing legislation has not yet been enacted, that at the time the procurement is entered into there must be in effect a law authorizing the procurement pursuant to 5 U.S.C. 3109 and requiring no further Secretarial action than that required by the implementing legislation current at the time the D&F is issued;
- (viii) where appropriate, authorization to contract across fiscal years (see 22-204.2), and in such cases, where the implementing authority cited is annual legislation, an added condition that in the event the implementing authority is not renewed for the following fiscal year the contracting officer shall terminate the contract in accordance with its terms; and
- (ix) the date of expiration of the authority granted by the D&F.

22-206 Requests for Determinations and Findings. Requests for authorization to procure expert or consultant services pursuant to 5 U.S.C. 3109, whether from individuals or from firms, must contain statements required by Departmental regulations to support the determinations. The responsibilities of the various organizational levels in the Departments with respect to requests for D&Fs are also set forth in Departmental regulations.

22-207 Contracts With Individual Experts or Consultants.

22-207.1 Method and Amount of Payment. The contract may provide for compensation at rate for time actually worked (e.g., amount per day, per week, per month, etc.), or it may provide for performance of a specific task at a fixed price, or it may provide for nominal compensation. The amount or rate of payment will be determined on a case-by-case basis, taking into account (among any other relevant factors) the relative importance of the duties to be performed, the stature of the individual in his specialized field, comparable pay for positions under the Classification Act or other Federal pay systems, rates paid by private employers, and rates previously paid other experts or consultants for similar work. Normally, compensation will be at the per diem equivalent of salaries in the GS-13 to GS-15 range. Compensation for personal services is subject to the limitation in 22-210.

22-207.2 Benefits. When an individual expert or consultant is furnishing personal services and the contract provides for a regularly scheduled tour of duty during each administrative work week, the contract shall also provide that the contractor will be accorded the same paid annual and sick leave benefits as those to which he would be entitled under Departmental personnel regulations if he were employed by excepted appointment during the period of the contract. The contract may also provide for similar benefits (e.g., paid holidays, paid administrative leave), but these shall in no event exceed those to which the individual would be entitled under excepted appointment. No benefits shall be accorded the

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contractor which are not specifically provided for in the written contract. The contracting officer shall effect necessary coordination with the cognizant civilian personnel office (see 22-207.5).

22-207.3 Taxes. When the individual is to render personal services, the compensation generally is subject to FICA (Social Security), FUTA (Unemployment), and federal income withholding tax. It may also be necessary to report or withhold state income tax under 5 U.S.C. 84b. The contracting officer shall take appropriate steps in coordination with the cognizant civilian personnel office to have deductions and reports made where required by law.

22-207.4 Conflict of Interest. The contracting officer shall assure himself that individual experts or consultants who are to render personal services under contract familiarize themselves with Executive Order 11222, May 8, 1965, "Prescribing Standards of Ethical Conduct for Government Officers and Employees," 30 Federal Register 6469 (1965), and that they comply with it and with Departmental regulations implementing it.

22-207.5 Administrative Treatment. Individual experts or consultants who are to render personal services under contract are charged against personnel ceilings in the same way as experts and consultants employed by excepted appointment. Also, the cognizant civilian personnel office must maintain certain records on individual experts and consultants who render personal services. Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office before award of a contract for personal services and may also designate the appropriate personnel officer as his representative for the purpose of administering contract provisions relating to benefits, obtaining necessary data from the contractor for tax withholding purposes, and administering applicable conflict of interest provisions.

22-208 Contracts With Firms for Expert or Consultant Services. Contracts with firms for expert or consultant services ordinarily should deal only with rights and obligations as between the Government and the firm, and should not deal with the question of compensation by the firm of the individuals it assigns to the work or with any other rights or obligations as between the firm and these individuals. However, where the services to be rendered are personal services, payment for the services of each expert or consultant is subject to limitation in 22-210.

22-209 Contracts for Stenographic Reporting Services. Stenographic reporting services normally are provided by regular civilian employees appointed under the usual civil service procedures. However, under certain circumstances these services may be procured by contract from individuals or firms pursuant to 5 U.S.C. 3109, as where there are variable requirements or insufficient qualified personnel and necessity or economy to the Government demands procurement by contract. Such contracts normally shall be written on an end-product basis and payment made according to delivered items (e.g., number of copies of transcript, words per page, etc.), and the contractor ordinarily shall be required to furnish the necessary materials (typewriter, paper, bindings, etc.). These contracts are subject to all the provisions of this Part.

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22-210 Limitation on Payment for Personal Services.

(a) When the expert or consultant services being procured pursuant to 5 U.S.C. 3109 personal services, payment for the services of each expert or consultant shall not exceed the highest rate fixed by the Classification Act pay schedules for grade GS-15—or, in the case of professional engineering services primarily involving research and development or professional services involving physical or natural sciences or medicine, the highest rate payable to a GS-18. In addition, the contract may provide for such per diem and travel expenses as would be authorized for a Government employee, including actual transportation and per diem in lieu of subsistence while the expert or consultant is traveling between his home or place of business and his official duty station.

(b) If a fixed-price contract which is predominantly for nonpersonal services also includes personal services, the requirements of (a) above are applicable to the personal services if it is feasible and practicable to price them separately.

22-211 Modification of Contracts. When supplemental agreements or change orders are required which substantially change the basis upon which the D&F was made, such as to revise substantially the scope of work or time limitations, or to apply additional funds, authorization shall be requested in the same way as authorization to procure the services by contract in the first place.

22-212 Renewal of Contracts.

22-212.1 General. A contract may provide for renewal—for a maximum of one year each time—by written notification to the contractor from the contracting officer.

22-212.2 Applicable D&F Required. A contract shall not be renewed unless either a new D&F has been issued, or the D&F authorizing the original contract (or a prior renewal) has not yet expired and specifically authorizes the renewal, or an unexpired class D&F covering that type of contract is in effect.

22-212.3 Other Requirements. Renewal of a contract legally creates a new contract; therefore, renewal of a contract is improper unless all the requirements and limitations of this Part have been complied with.

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SERVICE CONTRACTS

Part 3—Engineering and Technical Services

22-301 Definition of Contractor Engineering and Technical Services. *Contractor engineering and technical services* consist of the furnishing of advice, instruction, and training to Department of Defense personnel, by commercial or industrial companies, in the installation, operation, and maintenance of Department of Defense weapons, equipment, and systems. This includes transmitting the knowledge necessary to develop among those Department of Defense personnel the technical skill required for installing, maintaining, and operating such equipment in a high state of military readiness. These services are subdivided into the following categories.

(a) *Contract plant services (CPS)* are those engineering and technical services provided by the trained and qualified engineers and technicians of a manufacturer of military equipment or components, in the manufacturer's own plants and facilities.

(b) *Contract field services (CFS)* are those engineering and technical services provided on site at defense locations by the trained and qualified engineers and technicians of commercial or industrial companies.

(c) *Field service representatives* are those employees of a manufacturer of military equipment or components who provide a liaison or advisory service between their company and the military users of their company's equipment or components.

22-302 Contracting for Engineering and Technical Services.

22-302.1 General. Every contract calling for engineering and technical services, whether it calls for only those services or whether it calls for those services in connection with the furnishing of an end item, shall show those services as a separate and identifiable line item separately priced. The contract shall contain definitive specifications for the services and shall show the man-months involved.

22-302.2 Personal Services. Notwithstanding 22-102, in the event unusual requirements involving essential mission accomplishment necessitate the procurement of contract field services (CFS) which appear to be personal services, those services may be obtained by contract for an interim period if that particular procurement is specifically authorized by the Assistant Secretary of Defense (Manpower).

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22-302.2

ARMED SERVICES PROCUREMENT REGULATION

QUESTION AND ANSWER SUMMARY

SERVICE CONTRACTS

1. What is a service contract?

A service contract is one which calls directly for a contractor's time and effort rather than a concrete end product. For purposes of this definition, a report shall not be considered a concrete end product if the primary purpose of the contract is to obtain the contractor's time and effort and the report is merely incidental to this purpose.

(DAR 22-1-1(a))

2. Can a report, manual, computer program, or other "software" type end product be considered a supply for the purpose of acquiring same under a supply rather than a service contract?

Yes. See question 1 and its answer. The key considerations are:

(a) that obtaining delivery of the "software" type end product is the primary purpose of the contract, i.e., the end product itself is what is of value to the Government--not the time and effort of the contractor in producing the end product; and

(b) that the contract is structured in supply terms to provide a clear basis for acceptance or rejection of the delivered end product, e.g., the contract specification is sufficiently detailed (including inspection/QA procedures as appropriate) to provide a clear basis against which to inspect and accept or reject the end product.

(c) the Contracting Officer's goal should be to limit Government involvement in contract performance to the extent necessary to assure timely delivery of an end product in conformance with contract specifications, and to provide adequate cost surveillance, if required by the type of contract used.

3. Who determines whether a prospective contract is to be a service contract or a supply contract?

The determination of whether a given contracted effort is a service contract (and thereby may be subject to the Service Contract Act of 1965, as amended), or a supply contract (and thereby subject to the Walsh-Healey Public Contracts Act) rests with the cognizant Principal Contracting Officer (PCO), with advice of counsel as required. However, the Department of Labor (DOL) (See DAR Section XII, parts 8 and 10) is the final authority on questions of labor law application in Government contracts. Therefore DOL could conceivably determine that the Service Contract

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Act should be included in a particular contract, whether that contract was written as a supply or service type contract. Should this unlikely event occur, it would not, standing alone, invalidate the obligation of funds under the supply contract.

4. In addition to the labor law applicability in the supply vs. service contract question, what other contractual issues are involved in this question?

First and foremost there is the issue of contractor responsibility for performance, i.e., enforceability of the contract. Service contracts - except for certain fixed price service contracts such as mess attendant services contracts and others in the Commercial or Industrial Type Activities (CITA) area - generally only obligate the contractor to apply his time and (best) effort toward a stated task. A supply contract, on the other hand, obligates the contractor to deliver the specified end product by a given date. Consequently, the Government's rights and remedies under a supply contract versus a service contract are better defined and enforceable, where a breach of contract is involved.

There is also a contract administration implication in the service vs. supply contract question. By their very nature, service contracts require more Government monitoring and general involvement with the contractor's performance effort (reference: NAVSUPINST 4330.6, "Administration of Service Contract" and the personal vs. non-personal services consideration). A properly structured supply contract permits the Government a larger degree of disengagement from the contractor, relying upon the specifications and other features of the contract to govern the contractor's performance.

Funds obligation and control is a related, tertiary issue. A supply contract obligates funds for the full contract price even though delivery of the end product may not occur until a subsequent fiscal year. The funding of service contracts is different and very complex, as discussed in the remainder of this question and answer summary.

5. May annual appropriations be cited to fund a service contract - the term of which crosses fiscal years?

The general rule is that the term of a service contract that is funded by annual appropriations shall not extend beyond the end of the fiscal year current at the beginning of the contract term. (DAR 22-107(a))

6. Are there any exceptions to the above rule?

Yes. DAR 22-107(a) lists the following as categories of contracts in which funds cited may be annual appropriations even though the term of the contract crosses fiscal years:

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- a. A one-year contract for maintenance of tools or facilities if authorized under the current Department of Defense Appropriations Act;
- b. A multi-year service contract within the coverage of DAR 1-322.8;
- c. A one-year requirements or indefinite quantity contract, as defined in DAR 3-409.2 and 3-409.3, in which any specified minimum quantities are certain to be ordered in the fiscal year current at the beginning of the contract term (see 1-318); or
- d. A contract for expert or consultant services entered into in accordance with DAR 22-402.2, or for educational services, which cannot feasibly be subdivided for separate performance in each fiscal year. (See NCD 22-203)

NOTE: The next three questions address exception 6.a. above.

7. Regarding maintenance of tools or facilities, is maintenance of office equipment considered maintenance of "tools"?

No. Office equipment is not considered a tool as contemplated in DAR 22-107(a).

8. Regarding maintenance of tools, are these items considered tools: X-Ray machines, nuclear medicine equipment, central dictation system used by patient affairs, clinical laboratory items, all of which are fixed to buildings (mounted, not portable) and require utility services for operation?

No. Such medical equipment is not considered a tool or facility as contemplated in DAR 22-107(a).

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SPECIAL NOTE: The definition of what are tools has been narrowly construed since the mid nineteen fifties when this language was included in the Department of Defense (DOD) Appropriations Act. For example, in 1972 a proposed change to the DOD Appropriations Act was initiated attempting to delete the term "tool" and to expand the coverage to include equipment. Thus, the proposed change would have permitted crossing fiscal years with contracts funded by annual appropriations in the case of maintenance of plant equipment and office machines. However, Congress in 1973 refused to expand the coverage as proposed.

(Summarized from
Deputy NAVCOMPT
Counsel letter to Chief
of Naval Reserve dated
2 Aug 79)

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9. Have any specific requirements been identified by NAVCOMPT as clearly falling within the "maintenance of tools and facilities" exception which makes it permissible to cross fiscal years with the term of a service contract funded by annual appropriations?

Yes. It is acceptable for the following service contracts to cross fiscal years and to cite only the current annual appropriations:

- Janitorial services
- Grounds maintenance services
- Pest control services
- Guard services

Note that mess attendant service contracts do NOT fall under the maintenance exception and therefore may not cross fiscal years citing a single annual appropriation.

(Deputy NAVCOMPT Counsel
letter to Chief of Naval
Reserve dated 2 Aug 79)

10. Are there any other situations in which the obligation under a service contract may extend across fiscal year lines citing annual appropriations?

Yes. In order to examine this further exception, it is necessary to distinguish a "term" service contract from a service contract to perform a single undertaking.

Term type service contracts usually involve requirements like mess attendant services contracts, office equipment maintenance contracts, etc., and the contracts call for contractor efforts during a specified term (e.g., 1 Oct 80 through 30 Sep 81). Typically (but not exclusively), the service is a continuing requirement, like the type contracted out under the CITA program. Put simply, the objective of a service contract of a term nature is to assure "contractor coverage" during a given period of time, i.e., the term of the contract.

On the other hand, a contract for services which are a "single undertaking" would call for a specific task to be performed by the contractor by a specific time of delivery or completion. The words "specific task" here do not mean a task so well defined that use of a FFP contract is mandated. Indeed, the unknowns of the requirement may be great enough to require use of a CPFF type contract (completion form) (DAR 3-405.6(d)(1)). But, the specific task will have a clear beginning point and a defined completion point.

It is worthwhile to examine this distinction between a term service contract and a single undertaking service contract by use of several examples. A requirement for repair of a radar repeater by a specific delivery date may be a single undertaking. However, a contract for

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maintenance services on an estimated number of radar repeaters during a 12-month period would be a service contract of a term nature.

Similarly, a contract for services to install a radar system at a Government site may be a single undertaking, while a contract for contractor services as required to install an unknown number of radar systems during the twelve months following award would be a term service contract.

(23 Comp. Gen.
370; NAVCOMPT 022071)

Once it is found that a requirement is for services which are a single undertaking, the question arises as to whether the requirement represents a bona fide need of the current fiscal year. In the radar system installation example above, let us assume the radar system equipment becomes available for installation on 1 September and the installation effort will require an installation contractor ninety (90) days thereafter to complete. The system is needed now, the equipment is available for installation; and thus the installation service -- a single undertaking -- is a bona fide need of the current fiscal year. Therefore, the installation contract could properly be awarded this fiscal year citing current fiscal year annual appropriations even though performance will not be completed for several months into the next fiscal year; provided the contractor will commence the work this fiscal year and perform the contract without unnecessary delay.

Current fiscal year annual appropriations may be used to fund a service contract entirely, even though the contractor is required to perform at least a portion of the services in the subsequent fiscal year, provided the acquisition meets the following criteria:

- a. There is a bona fide need in the current fiscal year for services involving a single undertaking; and
 - b. The contract to fulfill this need is awarded prior to the end of the current fiscal year; and
 - c. There is a bona fide intent that the contractor shall commence work in the current fiscal year and perform the contract without unnecessary delay.
11. How does the single undertaking concept described above relate to placing orders under indefinite delivery type term contracts for services?

This exception fully applies to such orders. An order for services can be placed with annual appropriations calling for a completion date in the subsequent fiscal year if the above stated criteria are met with respect to the order.

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12. Should advice of counsel be obtained in applying the single undertaking concept?

Yes, in each and every case.

13. Is rental of equipment considered a service contract?

No. In fact, annual rentals or leases may be made for periods up to 12 months crossing fiscal years if necessary and be correctly funded in their entirety by annual appropriations available for obligation at the beginning of the rental/lease period. Note that the entire financial obligation is charged to the fiscal year in which the contract is executed and that the contract rental or lease period must begin in that same fiscal year.

(NAVCOMPT 022072-2r)

14. If a rental/lease contract includes the cost of equipment maintenance services as part of the rental/lease price (i.e., not separately priced from the rental charges), may the entire contract amount be charged to annual appropriations available for obligation at the beginning of the contract term, even though the contract period crosses fiscal years?

Yes, if the charges for maintenance or repair services are included in the basic rental charges for the rented or leased equipment. However, note that if the charges for maintenance services are separately stated, the charges may not be funded with annual appropriations past 30 September.

15. Are Navy Industrial Fund (NIF) citations considered "annual appropriations" within the meaning of DAR 22-107(a)?

There is no "yes or no" answer to this question. Generally, annual appropriations do not lose their character by virtue of their being cited in reimbursable orders to NIF activities. DOD Directive 7410.4 dated 25 Sept 1972, para VI, 1 states, "Statutory limitations and restrictions upon expenditures of appropriated funds are applicable also to expenditures made under industrial fund operations."

On the subject of NIF financial management, NAVMATINST 7600.3 of 24 April 1980, states (see enclosure (1), page 1): "Completion date of a Work Request, NAVCOMPT form 140, must be on or before the expiration date of the appropriation cited therein (e.g., the Operation and Maintenance, Navy Appropriation as an annual appropriation has a life of one fiscal year from 1 October thru 30 September, therefore, the completion date of a Work Request (citing O&MN) cannot be beyond 30 September of the fiscal year in which it is issued." Thus, annual appropriations do not lose their character and obligational validity by virtue of being provided to a NIF activity in a Work Request. The same basic concept applies to other appropriations such as RDT&E when

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cited in a Work Request to a NIF activity. However, because these are not "annual appropriations" and because of DOD/Navy policies such as incremental funding of RDT&E, the expiration dates of these other appropriations are not readily determinable without detailed information.

As stated in NAVMATINST 7600.3, the commanding officer of a NIF activity is responsible for the administration of the reimbursable orders accepted by that activity. The activity comptroller is designated to assist the commanding officer in this responsibility. This responsibility extends to the proper citation of funds in requisitions and purchase requests originated within the NIF activity for the procurement of supplies or services. Therefore, the contracting officer may rely and act upon these NIF fund citations in awarding contracts. However, in questionable cases, e.g., service contracts for terms extending beyond the end of the fiscal year (DAR 22-107(a)), the contracting officer should obtain written assurance from the NIF activity comptroller that the NIF funds cited are proper for this purpose.

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VI. CONCLUSIONS AND RECOMMENDATIONS

The following conclusions and recommendations are based on the study and research presented in previous chapters. The conclusions will be followed immediately by a specific recommendation or recommendations consistent with the nature of the conclusion.

A. CONCLUSION

The Act is a poor piece of Legislation which is impossible to properly administer. The administration of the Act by the Department of Labor has been confused and erratic, often promoting an end directly contradictory to that which is the stated purpose of the Act. It has been expensive in terms of the cost of its administration and it is inflationary pressure in that the Department of Labor's wage determination policies tend to disregard and eliminate the lower wage rates, transforming an average rate into a minimum rate.

RECOMMENDATION: The Act should be repealed. It would be foolhardy, however, not to recognize that such social legislation is seldom if ever repealed. Certainly, organized labor would be opposed to its repeal and few legislators could be expected to take a position which would be construed as being anti-labor regardless of the Act's effect upon the economy.

Short of repeal, the Act should be revised to provide for the following:

1. An increase in the jurisdictional amount of the Act in a realistic level, such as \$50,000 or \$100,000. This would permit the

Department of Labor to make fewer and, hopefully, better wage determinations, and represent the wages of from two to five employees annually.

2. Clarification that the Act applies only to "blue collar" workers and not to professional, management, administrative, or clerical personnel.

3. Prohibition of the making of prevailing wages and fringe-benefit determinations where such determinations cannot be supported with accurate wage data from the place of performance.

4. Prohibition of the use of a median or mean as the prevailing rate.

5. Prohibition of the issuance of any wage determination where no dominant rate exists.

6. Prohibition of the application of Davis-Bacon rates to service employees.

7. Prohibition of the application of a national, fringe-benefit determination.

8. A process under which the Office of Federal Procurement Policy, Comptroller General or the courts, have clear authority to review Department of Labor wage determinations and determinations as to the applicability of the Act.

9. Elimination of the requirement for paying successor contractor employees collectively bargained rates which applied to the predecessor contract if the successor contract is to be performed at a different location.

10. Elimination of the requirement for inclusion in service contracts of the wage rates which would apply if Federal employees subject to Section 5341 of Title 5 United States Code were performing the work.

B. CONCLUSION

Reported violations or non-compliance with the SCA appear to have been caused primarily by the unfamiliarity of procurement personnel with the regulations, as well as by carelessness, oversight and lack of management control.

RECOMMENDATION

The "guide" as presented in Chapter V presents an excellent means for solving the problems associated with unfamiliarity with the SCA. The guide could be utilized as a teaching aid or as the basic foundation for an in-house training program on the SCA. The guide provides the reader with the names, addresses and telephone numbers of a number of personnel that are very knowledgeable in the Service Contract Act arena. This list could be invaluable if it is utilized to exchange information on common problems and solutions. Hopefully, it will promote better communications and build bridges to span the gray areas of the SCA which have caused a lack of uniformity in implementation among the procuring activities in the Navy.

The guide outlines in a simple step by step format, procedures that could be followed to satisfy the requirements of the SCA. Purchasing agencies could incorporate these procedures into their procedures manual. Once they are incorporated, the auditing process is made easier due to the standardization. Audit points could be established and management control increased. In this manner, the guide could aid in developing an internal monitoring program on compliance.

C. CONCLUSION

The Department of Defense provides minimal training specifically on the Service Contract Act and its requirements to procurement personnel.

RECOMMENDATION

At present, the Army Logistic Management Center, Fort Lee, Virginia, offers a two hour session on the SCA within their Basic Contracting course. This is the only place where the SCA is even generally offered to procurement personnel. Obviously, two hours is not enough. It is recommended that more time be utilized in teaching the requirements of the SCA. It is further recommended that the guide as presented in Chapter V be adapted for utilization as a teaching aid in this course.

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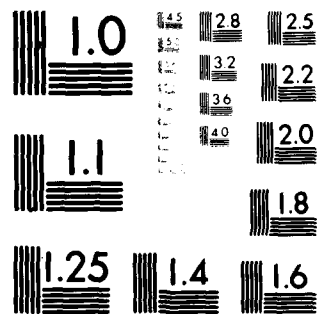
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